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The Effectiveness of the NAFTA Environmental Side Agreement's Citizen Submission Process: A Case Study of Metales y Derivados

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THE EFFECTIVENESS OF THE NAFTA ENVIRONMENTAL SIDE AGREEMENT'S CITIZEN SUBMISSION PROCESS: A CASE STUDY OF METALES Y DERIVADOS

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INTRODUCTION

The North American Agreement for Environmental Cooperation ("NAAEC"),[1] commonly referred to as the environmental side agreement to the North American Free Trade Agreement ("NAFTA"),[2] was designed in part to counteract the potential adverse environmental effects of liberalized trade under NAFTA. It is one of the most sophisticated institutional mechanisms targeting international environmental problems related to trade liberalization and globalization.

Among its most visible features has been the citizen submission process, which allows private individuals to file petitions with the North American Commission for Environmental Cooperation ("CEC" or "the Commission") concerning a party's failure to effectively enforce its environmental laws.[3] Since the first such submission in 1995, forty-eight pe-

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1. North American Agreement on Environmental Cooperation, Sept. 14, 1993, 32 I.L.M. 1480 [hereinafter NAAEC]. The agreement entered into force Jan. 1, 1994. *Id.* at 1495.

2. The North American Free Trade Agreement between the Government of the United States, the Government of Canada, and the Government of the United Mexican States, Dec. 17, 1992, 32 I.L.M. 296 [hereinafter NAFTA].

3. The Commission is made up of the Council, the Secretariat, and the Joint Public Advisory Committee ("JPAC"). NAAEC, *supra* note 1, at 1485, art. 8(2). The Council consists of the environmental ministers of each NAAEC party. *Id.* at 1485, art. 9. The Secretariat provides administrative support services for the Commission, including management of the citizen submission process. *Id.* at 1487, art. 11. The JPAC is a multinational advisory committee that provides for input from distinguished individuals. *Id.* at 1489, art. 16. For an evaluation of the Commission's work by former officials, see Greg Block, *Trade and Environment in the Western Hemisphere: Expanding the North American Agreement on Environmental Cooperation into the Americas*, 33 ENVTL. L. 501 (2003); Janine Feretti, *Innovations in Managing Globalization: Lessons from the North American Experience*, 15 GEO. INT'L. ENVTL. L. REV. 367 (2003).

titions have been filed.[4] Ten have resulted in publicly released factual records.[5]

The Commission's progress in disposing of citizen submissions indicates that it has begun to settle into a particular jurisprudence with regard to its application of the process requirements and its interpretation of the relevant NAAEC provisions. Thus, it seems appropriate to engage in an assessment of its effectiveness in promoting transparency, its major goal. Some commentators have taken an optimistic view,[6] and the growing number of published factual records appears to support such perspectives. However, an examination of one of the more recently published factual records, the Metales y Derivados matter, paints a darker picture.

Metales y Derivados (hereinafter "Metales") is a former battery and lead waste recycling facility located in Tijuana, Mexico, that was shut down in March 1994 and abandoned the next year by its U.S. owner, Jose Kahn.[7] For years, the poor and working-class neighboring community complained about pervasive environmental violations by the facility. When Mexican environmental officials finally instituted criminal enforcement proceedings, Kahn fled across the border to the United States rather than face charges in Mexico. Left behind were thousands of tons of wastes and contaminated soil containing lead and other heavy metals. As of the beginning of 2004, nine years after the facility was abandoned, after numerous visits by U.S. and Mexican government officials and high-ranking politicians, and after the publication of the CEC factual record detailing the enforcement failures of the Mexican government, little has changed.[8] The piles of lead slag and the barrels and sacks of waste were still sitting at the plant, and the toxic waste remained uncontrolled.

Contamination from industrial facilities such as Metales is not unusual. Serious occurrences of regulatory noncompliance with environ-

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4. Through October 2004. North American Commission for Environmental Cooperation, Citizen Submissions on Environmental Enforcement: Current Status of Filed Submissions, *at* http://www.cec.org (last visited Nov. 29, 2004).

5. *Id.* As of November 29, 2004, eleven submissions were still in the review or record development phase. Twenty-three have been closed without development of a factual record. *Id.*

6. *See, e.g.*, John H. Knox, *A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission*, 28 ECOLOGY L.Q. 1, 88 (2001) ("high marks for transparency"); Mark R. Goldschmidt, *The Role of Transparency and Public Participation in International Environmental Agreements: The North American Agreement on Environmental Cooperation*, 29 B.C. ENVTL. AFF. L. REV. 343 (2002).

7. North American Commission for Environmental Cooperation, Citizen Submissions on Environmental Enforcement: Current Status of Filed Submissions, Metales y Derivados Final Factual Record (SEM-98-007), Feb. 11, 2002, at 13–14, 58, *available at* http://www.cec.org/files/pdf/sem/98-7-FFR-e.pdf [hereinafter Metales Factual Record].

8. However, during the summer of 2004, after this article was completed, Mexican authorities began some cleaning activities. *See infra* Epilogue.

mental laws are by no means isolated events, whether in Mexico[9] or the United States.[10] What is particularly disturbing about Metales, however, has been the governmental response—at best ineffective, at worst willfully neglectful. If the official response to blatant and serious violations is as minimal as it has been in Metales, is there likely to be any meaningful response to the more typical, everyday forms of regulatory noncompliance? Can a mechanism such as the CEC submission process, and the transparency it promotes, effect any substantive change to the underlying regulatory enforcement policies?

A careful examination of Metales is warranted for three reasons. First, it points out opportunities for improving the operation of the submission process. With respect to ongoing negotiations about a Free Trade Area of the Americas and adoption of the Central America Free Trade Agreement, Metales is a cautionary tale counseling against simplistic adoption of the NAFTA environmental side agreement and its submission process as an equivalent environmental counterpart.

Second, an understanding of the process's success or failure yields insights into the role of involvement by civil society in efforts to monitor and enforce state compliance with international environmental agreements. Even though the citizen submission process is a fairly novel and innovative effort in this respect, the concept enjoys widespread support and acceptance.[11] Commentators have pointed to the potential benefits of participation by private citizens and nongovernmental organizations ("NGOs") in the monitoring and enforcement of environmental treaty obligations.[12] The general idea has been incorporated into treaty systems

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9. *See, e.g.*, RED MEXICANA DE ACCIÓN FRENTE AL LIBRE COMERCIO (RMALC), LA NETA—PROYECTO EMISIONES: ESPACIO VIRTUAL & TEXAS CENTER FOR POLICY STUDIES, HAZARDOUS WASTE MANAGEMENT IN THE UNITED STATES–MEXICO BORDER STATES: MORE QUESTIONS THAN ANSWERS 35–38 (2d ed. 2000); Edward J. Williams, *The Maquiladora Industry and Environmental Degradation in the United States-Mexico Borderlands*, 27 ST. MARY'S L.J. 765, 775–77 (1996).

10. For example, many severely contaminated sites are listed under the EPA Superfund program. *See* U.S. Environmental Protection Agency, *Superfund Site Contamination*, *at* http://www.epa.gov/superfund/sites/contamin/index.htm (generally listing sites by category) (last visited Nov. 29, 2004).

11. In fact, while not the subject of this article, the monitoring efforts by private individuals and NGOs of state compliance with human rights treaties has been long-standing and well-accepted. *See, e.g.*, HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 938–981 (2d ed. 2000) (on human rights NGOs).

12. *See, e.g.*, IMPROVING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL LAW (James Cameron, Jacob Werksman & Peter Roderick, eds., 1996); ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS (Edith Brown Weiss & Harold K. Jacobson eds., 1998); DAVID G. VICTOR, KAL RAUSTIALA, AND EUGENE B. SKOLNIKOFF, THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE (1998).

as diverse as the Montreal Protocol on Ozone Depleting Substances[13] and the Convention on the Regulation of International Trade in Endangered Species ("CITES").[14]

Third, careful examination of the NAAEC's application of the citizen submission process sheds light on the implications of multilateral environmental treaty regimes for North-South equity and environmental justice. Even though the NAAEC encompasses only the three countries of North America, its membership replicates the dynamics between developed and developing countries seen in many environmental agreements.[15]

This article examines the Metales matter as a case study of the effectiveness of the citizen submission process and the implications for environmental governance. Part I outlines the events that led to the filing of the citizen submission, the handling of the submission by the CEC, and the aftermath. Part II assesses claims of success and failure of the process, especially with respect to promoting transparency and accountability. While the Metales case succeeded in promoting openness and increasing public knowledge about governmental processes, it failed to bring about substantive environmental improvements, enhance enforcement activities, and improve public participation in environmental governance.

Part III locates the reasons for the Metales failures at three levels: international governance, national regulation, and market and social mechanisms. The failures are rooted in the nature of international organizations, including the difficulty of enforcing the international obliga-

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13. In addition to other Protocol parties and the Secretariat, the Montreal Protocol's Noncompliance procedure may also be triggered by information submitted by private individuals. Montreal Protocol on Substances that Deplete the Ozone, 26 I.L.M. 1541, 1557–58, art. 8 (1987); OZONE SECRETARIAT - UNITED NATIONS ENVIRONMENT PROGRAMME, HANDBOOK FOR THE INTERNATIONAL TREATIES FOR THE PROTECTION OF THE OZONE LAYER 161–164, 263–67 (5th ed. 2000), *available at* http://www.unep.ch/ozone/publications/index.asp. *See generally* O. Yoshida, *Soft Enforcement of Treaties: The Montreal Protocol's Noncompliance Procedure and the Functions of Internal International Institutions*, 10 COLO. J. INT'L ENVTL. L. & POL'Y 95 (1999).

14. The primary mechanism for the tracking and monitoring of shipments of specimen and parts of endangered species across international border is TRAFFIC, a database managed by the IUCN World Conservation Union and the Worldwide Fund for Nature. *See, e.g.*, DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAELKE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1022 (2002). *See generally* the TRAFFIC Network Web site, *at* http://www.traffic.org (last visited Nov. 15, 2004) (stating that its mission is to ensure that trade in wild plants and animals is not a threat to the conservation of nature).

15. For example, the United Nations Framework Convention on Climate Change assigns "differentiated responsibilities" for financial support, technology transfer, and emissions control to developed and developing party countries. United Nations Conference on Environment and Development, Framework Convention on Climate Change, May 9, 1992, 31 ILM 849, art. 4, *available at* http://unfccc.int/files/ essential_background/background_publications_htmlpdf /application/pdf/conveng.pdf.

tions under the NAAEC, the political economy of the border region, and the failure of social institutions and markets.

The fourth and final part addresses the lessons for improving environmental governance at the border and the effectiveness of the citizen submission process. In particular, I propose a set of reforms to the submission process that will make it more autonomous from control by the Council and the NAAEC parties. To address more substantive issues of environmental governance, especially political accountability, at the border, I also propose the creation of a binational border environmental quality district with a commission that is directly elected and accountable to border residents. These reforms are designed to address the underlying problems of border environment management, not just the symptoms.

After this article was completed and while it was going through this journal's editing process, encouraging news has emerged indicating that the persistence of the community activists has finally paid off and moved government officials to begin the process of site remediation. A brief epilogue summarizes these developments.

Ultimately, the Metales case illustrates the serious risks that a combination of rapid industrialization, liberalized trade, and inadequate environmental regulatory structures can present to the affected populations and the environment. Such conditions are present not only in North America but also in many developing countries. Understanding Metales can teach us lessons about dealing with such problems elsewhere.

I. THE STORY OF METALES Y DERIVADOS

A. Metales, Jose Kahn, and Colonia Chilpancingo

In 1986, New Frontier Trading Company, a California corporation, moved its lead battery recycling facility into a light-industrial neighborhood, Mesa de Otay Industrial Park, in Tijuana, Mexico. The facility, named Metales y Derivados, had been operated as a Mexican maquiladora plant since 1972 in another part of Tijuana. New Frontier and its owner, Jose Kahn, were based in San Diego, just across the U.S.-Mexico border.[16]

In many respects, Metales was hardly different from many other facilities in Tijuana and all along the U.S.-Mexico border. Incorporated as a maquiladora plant, Metales was able to take advantage of a Mexican law[17] that provides favorable tax and tariff treatment to manufacturing facilities, many of them assembly plants. Maquiladora plants usually

16. Metales Factual Record, *supra* note 7, at 20.

17. Programa de Industrialización Fronteriza (Border Industrialization Program) (1965).

import raw materials from the United States and then re-export the finished products. Their location on the Mexican side of the border gives them the benefit of cheap Mexican labor while maintaining proximity to the U.S. consumer market.

But Metales did differ in a crucial aspect from many other plants operated by large U.S. and multinational corporations. Unlike facilities that assembled auto parts, appliances, or consumer goods, Metales recycled wastes to produce refined lead and phosphorized copper granulates. Its raw materials were "lead-containing soils, telephone cable sheathing, lead oxide, discarded automotive and industrial batteries (that were cut open manually with an axe) and other types of lead scrap. . . . [In 1989, it ran] two lead smelting furnaces, two crucibles for lead refining, and two copper smelting furnaces. . . . The lead refining crucibles lacked an emission control system. The furnaces were fired by fuel oil and diesel."[18]

Metales was in trouble almost from the beginning. The toxic wastes generated by the recycling plant—including lead slag, copper slag, empty containers formerly containing arsenic, phosphorus and phosphoric acid, battery casings, heavy metal sludges, and waste oils from service elevators—were poorly managed.[19] Initially, most of the wastes were kept in open-air piles. Later, they were stored "in an enclosed area; in an open, roofed area; on concrete floors on racks; and on bare ground on the property."[20]

By the time Jose Kahn abandoned the recycling plant, at least six thousand, and perhaps as much as seven thousand, cubic meters of contaminated materials containing lead, antimony, cadmium, and arsenic had been generated and left untreated at the site.[21] As of February 2003, they could still be found lying in several piles on the ground, contained within the soil, and stored in sacks and drums.[22] Lead concentrations have been measured at up to 178,400 milligrams per kilogram of subsoil.[23] A 1999 Mexican government report stated that "the premises of the former company are a major health risk and . . . the wastes found there must be given suitable treatment."[24] The report further recommended that "urgent measures . . . be implemented immediately" and that the government "initiate restoration measures immediately."[25] The

18. Metales Factual Record, *supra* note 7 at 21.
19. *Id.* at 22.
20. *Id.*
21. *Id.* at 26.
22. *Id.* at 26, 33. Also, my own personal observations in February 2003.
23. *Id.* at 26.
24. *Id.* at 25.
25. *Id.* at 27.

cheapest method of addressing the waste, in situ treatment, was estimated at about 6.2 million pesos ($650,000 in 1999 dollars).[26]

More than a thousand people, residents of Colonia Chilpancingo, lived just 150 yards down a small ravine from the facility.[27] Many in the community complained early on about the plant's polluting activities, its illegal hazardous-waste disposal practices, potential groundwater contamination, and the health problems that these conditions allegedly caused among the residents.[28] Reports of skin and eye irritation and of gastrointestinal problems were common, as were dizziness, nausea, and other symptoms consistent with lead exposure. Concerns about impacts on children were especially severe. Families reported instances of infants with asthma and chronic skin irritations, newborns with birth defects, and babies with hydrocephalus.[29]

B. Enforcement Efforts by Mexican and U.S. Authorities

According to Mexican government records, the recycling plant was inspected five times between 1987 and 1993.[30] Each time, serious environmental violations were found. At one point, in 1991, the government ordered a temporary shutdown of the facility, but the plant was soon allowed to recommence operations. [31] It was not until March 28, 1994, that the government shut down the facility permanently. [32] Mexican authorities filed criminal charges against Jose Kahn in 1993, during the final plant closure proceedings, and in 1995 issued a warrant for his ar-

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26. *Id.* at 27, 116.

27. *See Petition Before the Commission for Environmental Cooperation, Under Articles 13, 14, and 15 of the North American Agreement for Environmental Cooperation, available at* http://www.environmentalhealth.org/CEC3.html#Petition (last visited Jan. 26, 2003) [hereinafter EHC Petition].

28. *Id.* at 4.

29. *Id.* Some of these symptoms are consistent with environmental health effects of the lead and other heavy metals found at the Metales site. Metales Factual Record, *supra* note 7, at 119–26. On the link of lead pollutants to hydrocephalus (abnormal accumulation of cerebrospinal fluid in the ventricles of the brain), *see* M. Vinceti et al., "Risk of Birth Defects In A Population Exposed To Environmental Lead Pollution," 278 SCIENCE OF THE TOTAL ENVIRONMENT 23-30 (2001). However, a recent (post-abandonment) health study of the community's children also showed that average blood lead levels were 6 µg/dL, lower than the 10 µg/dL threshold considered to be elevated. *Id.* at 8. For a more general discussion of concerns about such public-health issues associated with the maquiladora industry, see Kelly L. Reblin, *NAFTA and the Environment: Dealing with Abnormally High Birth Defect Rates among Children of Texas-Mexico Border Towns*, 27 ST. MARY'S L.J. 929 (1996).

30. Metales Factual Record, *supra* note 7, at 129–34, tbl., "Summary of Actions by Mexican Authorities with Respect to Metales y Derivados."

31. *Id.* at 129–30.

32. *Id.* at 132.

rest.[33] New Frontier Trading Company and Kahn then abandoned the plant.

Back in the United States, Jose Kahn became the subject of a twenty-six–count criminal indictment related to the illegal transport of hazardous materials to Mexico.[34] In August 1992, the Los Angeles County District Attorney's Office pressed charges against him for his company's shipments of hazardous materials to the Metales plant.[35] He pleaded guilty in 1993 to two felony counts, a $50,000 fine, and three years probation.[36] Kahn served no prison time.

The conditions of probation required Kahn to build a retaining wall around the facility and to contain the existing lead slag pile to prevent releases into the air or ground. The plea agreement also required him to pursue all license and permit applications for implementation of an electrowinning process[37] that could further recycle existing and future supplies of slag at the site. Finally, Kahn was to "obey all laws of California, the U.S. and Mexico, including the 'La Paz' agreement which requires that all waste material imported from the United States be 'repatriated' upon completion of processing."[38] At the end of the probation term, the agreement allowed Kahn to apply to the court for reduction of the charges to a misdemeanor and expungement. That apparently occurred, as a search of Los Angeles County Superior Court electronic records in 2003 did not show Mr. Kahn's felony guilty plea.[39] While Mr. Kahn's penalty was seemingly reduced, there is no evidence that the repatriation of waste ever occurred.

Initially, the Mexican government failed to take any action with respect to the abandoned facility and the piles of toxic waste. United States authorities had no jurisdiction to act because the facility was located in Mexico.[40] In 2001, community activists held demonstrations in front of the offices of New Frontier and Kahn's residence in San

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33. *Id.* at 131. *See also* Peter Fritsch, *Mexican Toxic-Waste Case Shows NAFTA's Limits*, WALL ST. J., Jan. 16, 2002, at A12. The exact status of this criminal proceeding remains unclear and has been unavailable to the public because of Mexican laws restricting access to such records.

34. CAL. HEALTH & SAFETY CODE § 25189.5(c) (1992); CAL. CODE REGS. tit. 26, § 22-66699 (1992).

35. Felony Compl., People v. Keelco Anodes, Inc., et al., Case No. BA062242 (L.A. Super. Ct. 1992), document on file with author; Metales Factual Record, *supra* note 7, at 22.

36. *Id.* (Transcript of sentencing hearing, April 15, 1993, Case No. BA 062242).

37. Electrowinning is the recovery of metals from a solution by electrolysis.

38. Plea Agreement, dated April 15, 1993 (on file with author).

39. Court records may be accessed, for a nominal fee, through LA Court Online, available at http://www.lasuperiorcourt.org.

40. This position has been expressed, off the record, by EPA officials in personal conversations.

Diego.[41] Mexican officials eventually had the lead slag piles covered with plastic tarps to protect against rain and wind. Officials also repaired the cinder-block wall surrounding part of the recycling plant. In January 1995, they removed more than four thousand kilograms of explosive red phosphorus.[42]

Little else was done afterward. At one point, citizens took measures into their own hands by painting the word *peligro* ("danger") together with a skull and crossbones in a number of places on the wall.[43] The environmental and public health dangers of the site, however, remained largely unabated. During rainstorms, runoff carried the toxic wastes into the neighboring community. The acidity of the waste leachate[44] seriously corroded portions of the wall. Passersby, including children, could easily enter the property by scaling the walls or slipping through the two-stranded barbed wire fence. Occasionally, homeless people took up residence there.[45] A bus company even attempted to use the property as a parking lot for its vehicles.[46]

C. The CEC Citizen Submission Process

By October 1998, the community activists were fed up. On behalf of Colonia Chilpancingo, two community organizations, the San Diego–based Environmental Health Coalition ("EHC") and the Mexico-based Comité Ciudadano Pro Restauración del Canon del Padre y Servicios Comunitarios, filed a citizen submission ("EHC submission") with the North American Commission for Environmental Cooperation ("CEC").[47] The petition alleged that the Mexican government had failed "to effectively enforce its environmental law" against Metales y Derivados and the facility's owners.[48]

The submission process, also called the Article 14/15 process, is primarily managed by the Commission's Secretariat. Under Article 14 of the NAAEC, the Secretariat of the CEC "may consider a submission from any non-governmental organization or person asserting that a Party

41. *Victory at Last! Community Celebrates Metales y Derivados Cleanup Agreement*, 23 TOXINFORMER (Envtl. Health Coalition), Aug. 2004, at 3–5, *available at* http://www.environmentalhealth.org/AUG2004.pdf (last visited January 5, 2005).

42. Metales Factual Record, *supra* note 7, at 52.

43. *Id.* at 58.

44. Leachate is wastewater that results when rainwater percolates through a slag pile, leaching out some of the toxic substances from the pile and carrying them wherever it flows.

45. Metales Factual Record, *supra* note 7, at 58.

46. EHC Petition, *supra* note 27 (pt. 2, "Factual Background").

47. For an overview of the submission process, see David L. Markell, *The Commission for Environmental Cooperation's Citizen Submission Process*, 12 GEO. INT'L ENVTL. L. REV. 545 (2000) [hereinafter Markell, *Commission*]; Knox, *supra* note 6, at 59–67.

48. Metales Factual Record, *supra* note 7, at 9.

is failing to effectively enforce its environmental law."[49] The petition must satisfy threshold requirements with respect to language of the submission, identification and residence of the submitter, specificity and purpose of the allegations, and notice to the alleged offending party.[50]

The Secretariat must then determine whether to request a response from the party targeted by the submission. The decision to request a response is based on four factors: (1) whether the submission "alleges harm" to the submitter; (2) whether it raises matters that, if studied, would further the goals of the NAAEC; (3) whether the submitter has pursued available private remedies; and (4) whether "the submission is drawn exclusively from mass media reports."[51] If a response is merited, the responding party (designated by the agreement as the "Party Concerned") is required to advise the Secretariat within sixty days "whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further."[52] The responding party is also encouraged to provide other information, such as whether there have been relevant past judicial or administrative proceedings, whether relevant private remedies are available to the submitter, and whether the submitter has pursued any such remedies.

If the Secretariat finds that the submission warrants development of a factual record, its recommendation and reasons are forwarded to the CEC Council.[53] The Council, made up of the Administrator of the U.S. Environmental Protection Agency ("EPA") and the environmental ministers of Canada and Mexico, may then, upon a two-thirds vote, direct the Secretariat to prepare a factual record.[54] Information is drawn from available sources, including the NAAEC parties, private individuals, and NGOs.[55] Before the factual record is finalized, the parties have forty-five days to comment on its accuracy. After incorporation of "appropriate" comments, the final factual record is submitted to the Council.[56] By a two-thirds vote, the Council can allow the public release of the final factual record.[57]

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49. NAAEC, *supra* note 1, at art. 14(1).

50. To be precise: the petition must be in a language designated by the alleged violating party; specific allegations must be accompanied by any documentation on which they are based; the petition must "appear[] to be aimed at promoting enforcement rather than at harassing industry"; and it must include any response the party may have already made to the petitioner's written notice. *Id.* at art. 14(1)(d).

51. *Id.* at art. 14(2)(a)-(d); Ignacia S. Moreno et al., *Free Trade and the Environment: The NAFTA, the NAAEC, and Implications for the Future*, 12 TUL. ENVTL. L.J. 405, 444–45 n.253 (1999).

52. NAAEC, *supra* note 1, at art. 14(3)(a).

53. *Id.* at art. 15(1).

54. *Id.* at art. 15(2).

55. *Id.* at art. 15(4).

56. *Id.* at art. 15(5)-(6).

57. *Id.* at art. 15(7).

The CEC submission process offers no substantive remedy and no sanctions.[58] At best, a meritorious complaint can be rewarded with an investigation of the allegations and the development and possible publication of a factual record on the enforcement failure. The publicity, public pressure, and official validation of community concerns generated by a published factual record do, however, present an opportunity to officially prompt and provide a justification for willing government officials to take appropriate substantive remedial steps. Finally, publication can serve as a potential trigger for the bilateral dispute settlement process outlined in Part V of the NAAEC.[59]

In its Metales submission, the EHC raised three specific enforcement failures by Mexico: (1) Mexico's failure, under Article 170 of the General Law on Ecological Balance and Environmental Protection (Ley General del Equilibrio Ecológico y la Protección al Ambiente ("LGEEPA")), to take "proper safety measures to prevent the Metales y Derivados site from posing an imminent risk to the ecological balance and to public health;" (2) its failure, under LGEEPA's Article 134, to take "appropriate actions to control or prevent soil contamination in and near the Metales y Derivados site;" and (3) its failure, under Article 415 of the Federal Criminal Code (Código Penal Federal—CPF), Article 3 of the International Extradition Law (Ley de Extradición Internacional), and Articles 1 and 2 of the Extradition Treaty Between the United States of America and the United Mexican States, to procure extradition of the owner of Metales y Derivados from the United States to face criminal charges in Mexico.[60]

During the Secretariat's review of the submission, at least two unexpected developments occurred that disturbed the submitters. First, the Secretariat investigated only the merits of the allegations related to Articles 170 and 134 of LGEEPA. Mexico's failure to seek extradition was determined by the Secretariat to be unreviewable under the NAAEC's Article 14/15 process. Mexico asserted that the substantive environmental provisions on which the criminal enforcement proceeding was based had been repealed during a revision of the Mexican penal code. No savings clause had been included.[61] The Mexican government con-

58. Markell, *Commission, supra* note 47, at 571.

59. Moreno et al., *supra* note 51, at 405, 444.

60. *See* EHC Petition, *supra* note 27; *see also* Metales Factual Record, *supra* note 7, at 14.

61. Metales Factual Record, *supra* note 7, at 14 & nn.2, 16. The actual argument was that the substantive provision cited by the submissions, CPF 415, was incorrect. Instead, the relevant provisions for the criminal prosecution were LGEEPA 183, 184, and 185. However, these provisions had been repealed during a legislative revision, thus depriving enforcers of the necessary substantive violation. *Id.* at 16.

cluded, and the Secretariat agreed, that the implicit repeal of the underlying substantive environmental law provision negated the claim.

Second, from the outset the Mexican government insisted that its response to the submission, filed June 1, 1999, be kept confidential.[62] Surprisingly, that designation prevented the public release not just of specific information or excerpts from the response, but of the response in its entirety. Mexico's response to the enforcement failure allegations remained unavailable to the public until June 28, 2001, when Mexico withdrew the confidentiality designation.[63] As a result, much of the CEC process remained shrouded in secrecy.

On May 16, 2000, the Council instructed the Secretariat to develop a factual record on the EHC submission.[64] For this purpose, the Secretariat requested information from a broad range of organizations and individuals, including Mexican government officials. In the invitation to furnish information, the Secretariat flagged issues such as "obstacles to the effective enforcement of LGEEPA 170 and 134 in regard to the Metales y Derivados site."[65]

The Secretariat submitted its draft factual record to the Council on October 1, 2001, for a forty-five-day comment period. The final factual record, addressing comments by Canada and the United States, was completed on November 29, 2001.[66] By unanimous vote, the Council approved the public release of the final factual record on February 7, 2002.[67]

The factual record declined to draw any legal conclusions as to whether Mexico had failed "to effectively enforce its environmental law."[68] With the exception of the extradition failure, however, it did substantiate the alleged factual predicates of the enforcement failures.

Mexico's response to the allegations focused exclusively on resource availability issues. It reported that the Tijuana office of the Mexican Federal Attorney for Environmental Protection ("PROFEPA") had, as of that date, a "total of 14 staff persons, including 6 inspectors and 2 lawyers, who worked on proceedings relating to the maquiladora industry (740 companies in September 2000) as well as natural resources . . . .

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62. Metales Factual Record, *supra* note 7, at 9 & n.1.

63. *Id.*

64. Council Res. 00-03, Instruction to the Secretariat of the Commission for Environmental Cooperation ("CEC") with Regard to the Assertion That Mexico Is Failing to Effectively Enforce Articles 134 and 170 of the General Law on Ecological Balance and Environmental Protection (SEM-98-007), Metales Factual Record, *supra* note 7, app. 1 at 63.

65. Metales Factual Record, *supra* note 7, app. 5 at 87.

66. GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 291, tbl. (David L. Markell & John H. Knox eds., 2003). Mexico did not submit any comments.

67. *Id.*

68. Metales Factual Record, *supra* note 7, at 59–60.

[A] total of 1,200 proceedings have been instituted since 1993, and 800 of them remain open. [However,] 4 or 5 proceedings may relate to the same company."[69] Lack of adequate personnel and other resources, Mexico implied, was to blame for its enforcement failures. The factual record also pointed to lack of resources as a barrier to engaging in environmental cleanups of the type necessitated by Metales. Mexico thus sought only to explain and justify its inaction rather than to contest the accuracy of the submission's allegations.

D. The Aftermath

The aftermath of the factual record has been less than enchanting for community activists. In 2002, in response to continued community protests and demonstrations, PROFEPA put up new warning signs and covered up the wastes again with plastic tarps. By early 2003, when I visited the facility, the tarps were gone.[70] No other significant remedial action had been taken. In fact, the fencing and walls surrounding the site had deteriorated further and were largely in a state of disrepair. People could enter the site easily, and the contaminated wastes were readily carried off the site by wind and rain.

Mexican government officials have never pressed for Jose Kahn's extradition. As a result, California and federal authorities in the United States have not sought to execute the warrant for his arrest. In the summer of 2003, Victor Lichtinger, then head of the Mexican environmental ministry, promised to address the contamination. Unfortunately, not more than a month later, Lichtinger was dismissed from his job by President Vincente Fox. On the positive side, Mexican legislators familiar with the Metales matter have discussed the possibility of creating a Mexican equivalent of the U.S. Superfund program as a way of providing cleanup funds for future abandoned hazardous-waste sites.[71]

As for Jose Kahn, he has not set foot in Mexico since abandoning the Metales plant. Kahn has served no time related to the Metales violations. He still lives only miles away from the border in San Diego, California.[72] New Frontier remains an active San Diego–based corporation.[73] Kahn did apply to the North American Development Bank[74] for

69. *Id.* at 43.

70. It is unclear what led to their destruction or possible removal.

71. Interview with Cesar Luna, Counsel for the Environmental Health Commission in the Metales y Derivados submission to the Commission for Environmental Cooperation (Mar. 22, 2004).

72. Fritsch, *supra* note 33.

73. The company has had estimated annual sales of between $700,000 and $1 million. EHC Petition, *supra* note 27, at 8.

an $850,000 loan to cap the site with asphalt or concrete, the most rudimentary of options to address the hazards of the wastes. However, the loan application was denied in 2003.[75] As of early 2004, the residents of Colonia Chilpancingo and environmental activists still held protest rallies on a regular basis, but government officials remained substantively unresponsive.

II. AN ASSESSMENT OF THE METALES CASE

What does the Metales case tell us about the success or failure of the citizen submission process? This section begins by presenting the case in the light most favorable to proponents of the process, and then sets out a more critical assessment.

A. The Citizen Submission Process Worked! Transparency, Monitoring, and Facilitation of Domestic Environmental Enforcement

If viewed narrowly, within the declared purpose of the citizen submission process, the Metales case can be seen as a success. The process was designed to create a factual record documenting both the submitter's assertions "that a Party is failing to effectively enforce its environmental law"[76] and the response of the Party concerned.[77] It accomplished that goal. The CEC published the complaints of the residents of Colonia Chilpancingo, documented the environmental offenses of Metales y Derivados, and gave Mexican governmental authorities an opportunity to respond.

The record's utility goes beyond the compilation of existing documents and information provided by the petitioner and the Mexican government, however. Given the CEC's own factual investigation and evaluation of the claims and responses, it is a quasi-independent determination of the facts underlying the submission's events. It creates transparency with respect to Mexico's environmental regulatory policies by telling the public what actually happened near the plant in Tijuana.

Transparency can have value beyond increasing the public's knowledge about the processes of enforcing and implementing environmental laws. A credible account of the events can "promote . . . public partici-

74. A regional development bank created at the same time as the CEC to provide financing for environmental infrastructure projects.

75. Joe Cantlupe and Dana Wilkie, *Cleanup Slated At Toxic Plant: U.S.-Mexico Plan Targets Closed Facility In Tijuana*, SAN DIEGO UNION-TRIBUNE, Feb. 16, 2004, at B1.

76. NAAEC, *supra* note 1, at art. 14(1).

77. Knox, *supra* note 6, at 87.

pation in the development of environmental laws, regulations and policies."[78] Information about enforcement failures may also be used by private citizens, NGOs, politicians, and others to trigger domestic mechanisms, whether legal or political, to change the behavior of enforcement authorities. With greater public awareness, public pressure might even shame Mexican government officials into acting. Overall environmental quality should be improved.

If Antonia Chayes and the late Abram Chayes are correct in attributing the failure of states to comply with their international treaty obligations primarily to inadvertence, lack of capacity, or transitional difficulties,[79] a credible and neutral account of domestic environmental enforcement failure should lead to self-corrective actions. An accurate factual record would show a party its mistakes and induce a willing party to reexamine and adjust its regulatory and enforcement policies so as to correct the enforcement failure. It could even avoid future enforcement failures without the use of coercion.

If one is skeptical of such possibilities, the information generated by the factual record can be instrumental in other ways. To the extent that the factual record documents a violation of the NAAEC requirements, specifically with regard to the effective enforcement requirement,[80] it may serve as the basis for (informal) bilateral processes between the NAAEC parties seeking compliance. Either on its own initiative or in response to pressure from its citizens, another NAAEC party might utilize diplomatic or other government-to-government channels to induce behavioral changes. In essence, a factual record not only facilitates self-corrective actions but also, in the Chayes' terminology, the "management" of that party's compliance by others.[81]

If the factual record uncovers a persistent failure to enforce the party's environmental laws, the NAAEC's Part V formal bilateral consultation and dispute resolution process can be triggered. Pursuant to Part V, parties may seek consultation and dispute resolution as to "whether there has been a persistent pattern of failure by [a] Party to effectively enforce its environmental law." Factual records provide the information and necessary factual predicates to this process. A successful Part V claim may even lead to a penalty assessment and trade sanctions of up to ".007 percent of total trade in goods between the Parties."[82]

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78. NAAEC, *supra* note 1, at art. 1(h).

79. ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 10 (1995).

80. NAAEC, *supra* note 1, at art. 5(1).

81. *See* CHAYES & CHAYES, *supra* note 79, at 22–28; Knox, *supra* note 6, at 59–67.

82. NAAEC, *supra* note 1, at art. 34(5) and Annex 34. However, Canadian penalty assessments may be enforced in Canadian courts.

Success of the Metales submissions may be seen not only in the actual completion of a factual record substantiating the submitters' allegations, but also in the ability of the submission process to increase transparency with respect to Mexican environmental regulatory and enforcement policies. In turn, transparency can potentially improve public accountability by environmental officials, promote public participation, encourage the engagement of informal, managerial efforts to bring about compliance, and potentially trigger the use of formal state-to-state dispute settlement mechanisms. Metales thus seems to validate the importance, utility, and success of the citizen submission process.

B. The Citizen Submission Process Failed! The Lack of Accountability for Actual Outcomes

In spite of the ability of factual records to increase public information about national environmental policies, a more critical perspective on the submission process is appropriate. An appraisal that is narrow and does not consider the functions that the submission process was expected to serve is incomplete. Even if the process resulted in the successful creation of a factual record, the ultimate goal of transparency—improved accountability of CEC and national officials for their decisions—has not been served.

If transparency is intended to trigger substantive remediation of specific environmental and public-health problems, to promote environmental enforcement, and to increase public participation, the submission process comes up far short. First, the process itself provides no substantive environmental remedy for enforcement failures and has not had such effects in Metales. Second, the ability to "shame" governments into stepping up their enforcement actions is quite limited because the NAAEC explicitly recognizes certain excuses, and because the substantive scope of the factual record does not include other relevant governments, such as the United States. Finally, the process has failed to democratize environmental governance and promote accountability to the people who are most directly affected.

1. The Failure to Remediate Environmental and Public-health Problems

One of the greatest concerns of the residents of Colonia Chilpancingo has been remediation of the contaminated soils and restoration of the environment. As of the beginning of 2004, the submission process

had yet to produce concrete, substantive, environmentally beneficial consequences.[83] The factual record acknowledged as much:

> [T]he information presented by the Secretariat in this factual record reveals that, as a matter of fact, . . . no actions have been taken to restore the soil to a condition in which it can be used in the industrial activities corresponding to the zoning of the area, i.e., the Mesa de Otay Industrial Park in the city of Tijuana, Baja California, in order to enforce effectively LGEEPA Article 134 [which calls for the restoration and reestablishment of the quality of soil contaminated by hazardous waste].[84]

Since the publication of the factual record, EPA has allocated resources to study site cleanup options. As of early 2004, neither the Mexican or the U.S. government, however, has made funding available to clean up the site. The wastes still remain. To the extent that the submission process was designed to address the broader environmental concerns about pollution, environmental degradation, and public-health impacts resulting from U.S.-Mexico trade, it has not met those expectations.

There are at least two ready responses. First, one might argue that the submission process was never designed to provide a substantive remedy. Raising this issue not only restates the obvious but also seems to point out a non-issue. If the agreement's drafters did not intend to provide substantive environmental and public-health remedies, its ineffectiveness in mitigating specific environmental hazards cannot be seen as a failure on the part of the agreement.

Second, Metales arguably falls outside the scope of problems the NAAEC was designed to solve. Metales began its operations in 1986 and generated most of the problem wastes before the adoption of NAFTA in 1994. One would be hard-pressed to find a cause-effect relationship between the adoption of NAFTA and the environmental and public-health effects at the Metales site and the surrounding community.[85] If the NAAEC was only intended to address the adverse environmental effects of NAFTA, the contamination of Metales would fall outside of what the NAAEC and the submission process were designed to cover.

Yet such responses seem too facile. The NAFTA environmental side agreement, as its name intimates, was offered to environmentalists and many others concerned about the potential environmental conse-

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83. *But see infra* Epilogue.

84. Metales Factual Record, *supra* note 7, at 59–60.

85. *See, e.g.*, Sanford E. Gaines, *NAFTA as a Symbol on the Border*, 51 UCLA L. REV. 143, 162–75 (2003). Sanford Gaines has suggested that the positive developments in Metales, including the shut-down, rather than the negative ones should be attributed to the NAAEC. *Id.* at 159–60.

quences of liberalized trade as part of several concessions for dropping or weakening their opposition to NAFTA.[86] Thus, a contextualized assessment of the effectiveness and success of the NAAEC cannot stop with an inquiry into the agreement's written terms and obligations. It is also necessary to consider the promises made and expectations created about possible and likely environmental outcomes.[87]

During the public debates and congressional battles about the adoption of NAFTA, environmentalists repeatedly raised at least three serious issues: (1) the potential adverse environmental consequences of rapid industrialization on the Mexican environment, especially by growth of the maquiladora industry,[88] (2) the Mexican government's lack of capacity to deal with such issues, and (3) pressures on the United States to relax its environmental standards in response to competitive pressures by less stringently regulated Mexican industries.[89] These issues took on particular urgency because Mexico had for many years neglected the problems of pollution and environmental degradation.[90]

In response, and as part of efforts to persuade the public and congressional opponents to support NAFTA through the grant of fast-track trade negotiation authority, the elder Bush Administration made several promises in 1991. It pledged to ensure that the final version of NAFTA would contain environmental safeguards, to launch a number of coopera-

86. *See, e.g.,* REMARKS OF SENATOR MAX BAUCUS ON "NAFTA IN THE CONGRESS" TO THE AMERICAN BAR ASSOCIATION NATIONAL INSTITUTE ON THE NORTH AMERICAN FREE TRADE AGREEMENT (Jan. 29, 1993), *reprinted in* NAFTA & THE ENVIRONMENT: SUBSTANCE AND PROCESS 269, 269–72 (Daniel Magraw ed., 1995). *See also* Markell, *Commission, supra* note 47, at 547 & note 6; Kal Raustiala, *Citizen Submissions and Treaty Review in the NAAEC, in* GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 260 (David L. Markell & John H. Knox eds., 2003).

87. For general overviews of the NAFTA negotiation process and the role that environmental concerns played, *see* BARBARA HOGENBOOM, MEXICO AND THE NAFTA ENVIRONMENT DEBATE: THE TRANSNATIONAL POLITICS OF ECONOMIC INTEGRATION (1998); JOHN J. AUDLEY, GREEN POLITICS AND GLOBAL TRADE: NAFTA AND THE FUTURE OF ENVIRONMENTAL POLITICS (1997); Joseph F. DiMento & Pamela M. Doughman, *Soft Teeth in the Back of the Mouth: the NAFTA Environmental Side Agreement Implemented*, 10 GEO. INT'L ENVTL. L. REV. 651, 658–81 (1998).

88. *See* NATIONAL WILDLIFE FEDERATION ENVIRONMENTAL CONCERNS RELATED TO A UNITED STATES-MEXICO-CANADA FREE TRADE AGREEMENT (Nov. 27, 1990), *reprinted in* NAFTA & THE ENVIRONMENT: SUBSTANCE AND PROCESS 631, 632–34 (Daniel Magraw ed., 1995); STATEMENT OF NATURAL RESOURCES DEFENSE COUNCIL ON ADMINISTRATION ANNOUNCEMENT OF THE NORTH AMERICAN FREE TRADE AGREEMENT (Aug. 12, 1992), *reprinted in* NAFTA & THE ENVIRONMENT: SUBSTANCE AND PROCESS 682 (Daniel Magraw ed., 1995); SIERRA CLUB STATEMENT OPPOSING NAFTA: NOT THIS NAFTA (Sept. 13, 1993), *reprinted in* NAFTA & THE ENVIRONMENT: SUBSTANCE AND PROCESS 736, 736–38 (Daniel Magraw ed., 1995). *See also* HOGENBOOM, *supra* note 87, at 130–31, 136–37.

89. *See, e.g.,* Moreno et al., *supra* note 51, at 405, 410–13, and accompanying notes (1999); David L. Markell & John H. Knox, *The Innovative North American Commission for Environmental Cooperation, in* GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 3–4 (David L. Markell & John H. Knox eds., 2003).

90. HOGENBOOM, *supra* note 87, at 71–96.

tive environmental efforts with Mexico, and to engage in an environmental review of liberalized trade.[91] It also initiated the first discussions regarding the creation of a North American Environmental Commission.[92] Mexico itself, in anticipation of and accompanying the NAFTA negotiations, embarked on a high-profile effort to upgrade its environmental regulatory system.[93] Yet these efforts were unable to quell public skepticism.[94]

To ensure congressional support and passage of NAFTA's implementing legislation, the Clinton Administration conducted a further environmental review of NAFTA and negotiated the environmental side agreement, the NAAEC, as well as additional bilateral agreements with Mexico.[95] These efforts promised that the environmental safeguards incorporated into NAFTA, in combination with the environmental agreement, would prevent the worries of environmentalists from becoming reality.[96] Moreover, liberalized trade and higher standards of living would make Mexico a wealthier nation. There would not only be more resources to address environmental problems and enforce environmental regulations, but also an increase in Mexican society's commitment to and valuation of environmental quality.[97]

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91. *See* Moreno et al., *supra* note 51, at 414. *See also* OFFICE OF THE U.S. TRADE REPRESENTATIVE, REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES (1992). See also *President Announces Three-Year Program to Clean Up, Prevent Pollution at Mexican Border*, 22 ENV'T REP. (BNA) 2427 (Feb. 28, 1992).

92. *See* Joint Press Release, Ministers Responsible for the Environment of Canada, Mexico and the United States (Sept. 17, 1992), *reprinted in* NAFTA AND THE ENVIRONMENT: SUBSTANCE AND PROCESS 79–80 (Daniel Magraw ed., 1995); Letter from President Bush to Chairmen Lloyd Bentsen and Dan Rostenkowski (Sept. 15, 1992), *reprinted in* NAFTA AND THE ENVIRONMENT: SUBSTANCE AND PROCESS 237–38 (Daniel Magraw ed., 1995). *See* HOGENBOOM, *supra* note 87, at 96–106.

93. *See* Peter M. Emerson & Robert A. Collinge, *The Environmental Side of North American Free Trade*, *in* TERRY ANDERSON, NAFTA AND THE ENVIRONMENT: STUDIES ON THE ECONOMIC FUTURE OF NORTH AMERICA 51–52 (1993).

94. *See* Moreno et al., *supra* note 51, at 415.

95. *Id.*; *see also Clinton Endorses NAFTA with Certain Reservations*, 9 INT'L TRADE REP. (BNA) 1718, 1720 (Oct. 7, 1992).

96. *See, e.g., Environmental Implications of NAFTA: Hearings Before the House Comm. on Merchant Marine and Fisheries*, 103d Cong. (1993); Report of the Administration on the North American Free Trade Agreement and Actions Taken in Fulfillment of the May 1, 1991 Commitments, *reprinted in* NAFTA AND THE ENVIRONMENT: SUBSTANCE AND PROCESS 239, 245–49 (Daniel Magraw ed., 1995) [hereinafter Report of the Administration on NAFTA].

97. *See, e.g.*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, THE NAFTA: REPORT ON ENVIRONMENTAL ISSUES, *reprinted in* NAFTA AND THE ENVIRONMENT: SUBSTANCE AND PROCESS 393, 485–96 (Daniel Magraw ed., 1995) [hereinafter The NAFTA: Report]; NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION, FREE TRADE AND THE ENVIRONMENT: THE PICTURE BECOMES CLEARER 1–2 (2002) (citing Gene M. Grossman & Alan B. Krueger, *Environmental Impacts of a North American Free Trade Agreement*, *in* THE MEXICO-U.S. FREE TRADE AGREEMENT 13 (Peter M. Garber ed., 1994)); Report of the Administration on NAFTA, *supra* note 96, at 243–44; Kevin P. Gallagher, *The CEC and Environmental Quality: Assessing the Mexican Experience*, *in* GREENING NAFTA: THE NORTH

The final NAFTA package,[98] which included the NAAEC, the Border Environment Cooperation Commission, and the North American Development Bank,[99] was a grand compromise. Those concerned about the environment made concessions, relented in their opposition, or decided to support NAFTA. In return, they were left with assurances, promises, and expectations that the scheme negotiated by the Bush and Clinton Administrations would address their concerns.[100] Thus, a broad, contextualized assessment of the NAAEC must consider not only whether the agreement's terms and written goals have been fulfilled but also how well environmentalists' concerns have been met.

In the case of the Metales submissions, even if the lead contamination and adverse environmental effects cannot be causally attributed to the adoption of NAFTA, absolving the NAAEC and subsequent environmental regulatory efforts from all responsibility for them seems altogether unjustified in light of the NAFTA-NAAEC adoption debates and negotiation background. Environmentalists and community activists had been well aware of environmental problems at the border and of the need to remediate them. These concerns had specifically been brought to the attention of the first Bush and Clinton Administrations and the U.S. public as reasons for opposing NAFTA.[101] Because U.S.-Mexico cooperative environmental initiatives at the border and the NAAEC were in-

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AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 117–20 (David L. Markell & John H. Knox eds., 2003); Steven Globerman, *The Environmental Impacts of Trade Liberalization*, *in* TERRY ANDERSON, NAFTA AND THE ENVIRONMENT: STUDIES ON THE ECONOMIC FUTURE OF NORTH AMERICA 33–35 (1993); HOGENBOOM, *supra* note 87, at 179–81, 184–85. *See generally* Gene M. Grossman & Alan B. Krueger, *Economic Growth and the Environment*, 110 Q. J. OF ECON. 353 (1995).

98. For a description of the NAFTA compromise package, see, e.g., Robert Housman, *The North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment*, 30 STAN. J. INT'L L. 379, 394–422 (1994); Robert Housman & Paul Orbuch, *Integrating Labor and Environmental Concerns into the North American Free Trade Agreement: A Look Back and a Look Ahead*, 8 AM. U. J. INT'L L. & POL'Y 719 (1993).

99. Agreement Concerning the Establishment of a Border Environmental Cooperative Commission and North American Development Bank, U.S.-Mex., T.I.A.S. No. 12,516 (Nov. 16, 1993).

100. For example, the National Wildlife Federation stated after negotiation of the NAAEC had concluded that the "NAFTA, in combination with the newly formed North American Commission on Environmental Cooperation, will assure that: . . . environmental clean-up projects along the U.S.-Mexico border will receive adequate funding." National Wildlife Federation Statement Supporting NAFTA (Sept. 14, 1993), *reprinted in* NAFTA AND THE ENVIRONMENT: SUBSTANCE AND PROCESS 739 (Daniel Magraw ed., 1995).

101. *See, e.g.*, Justin R. Ward, Natural Resources Defense Council Statement Regarding Environmental Protection in the North American Free Trade Agreement (Sept. 3, 1991), *reprinted in* NAFTA AND THE ENVIRONMENT: SUBSTANCE AND PROCESS 658, 660–63 (Daniel Magraw ed., 1995); *see also* Markell & Knox, *supra* note 89, at 4; *cf.* NAFTA and Supplemental Agreements: Hearing Before the House Comm. on Ways and Means, 103d Cong. (1993) (testimony of Ambassador Michael Kantor, U.S. Trade Representative), *reprinted in* NAFTA AND THE ENVIRONMENT: SUBSTANCE AND PROCESS 279, 281–82 (Daniel Magraw ed., 1995) (referencing border cleanup needs).

tended to respond to all of these concerns, they should also be held responsible in that regard.[102] Metales should not have lingered as an uncontrolled and unremediated waste site.

Ultimately, Metales poses the question of whether the NAAEC and its companion agreements have adequately addressed the substantive concerns that inspired environmental activists to oppose NAFTA in the first place. To the extent that some of the most obvious expectations about the adverse environmental consequences of liberalized trade between the United States and Mexico have been left unresolved, the effectiveness of the NAAEC is debatable.

2. The Failure to Promote Enforcement

Even apart from a contextualized assessment, the submission process and the factual record have failed to achieve another widely acknowledged goal: to serve as the CEC's response to alleged instances of enforcement failures, in particular by encouraging, pressuring, or shaming party states to step up their enforcement efforts. The limited scope and content of the factual records bear much of the responsibility for this failure. Factual records do not draw any legal conclusions with respect to the submission's allegations, and they are narrowly focused on the allegations relating to the target party. The resulting understanding of causal connections between NAAEC obligations, regulatory and enforcement policies, and environmental impacts is limited and incomplete. The Metales case illustrates these two shortcomings well.

Lack of legal conclusions. Like other factual records, the Metales record draws no legal conclusions about Mexico's compliance with the NAAEC. The penultimate paragraph states that

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102. It is possible to suggest that the NAAEC and the CEC were not intended to be solely responsible for taking up the slack with respect to the adverse environmental effects of liberalized trade. Other institutions, such as the Border Environment Cooperation Commission, the North American Development Bank, the International Boundaries and Waters Commission (IBWC), Treaty between the United States of America and Mexico, Treaty Respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, U.S.-Mex., 59. Stat. 1219 (Feb. 3, 1944), and US-Mexico bilateral cooperative programs with respect to the border arising from the La Paz agreement, Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area, U.S.-Mex., 35 U.S.T. 2916 (Aug 14, 1983), were designed to work together with it. Yet, the corollary of a comprehensive program that relies on a number of border and tri-national institutions to address the environmental consequences of liberalized trade is that such a comprehensive program must be effective. Here, it means that the entities should have worked together to remediate the wastes at *Metales*. Especially given the peculiar role of the submission process in signaling failures of national environmental regulation and management, even if by itself it could not possibly be expected to do everything, it is not unreasonable to expect that it should have triggered actions by those other institutions. None of that has happened.

> [w]ithout aiming to reach conclusions of law on whether Mexico is failing to enforce LGEEPA Article 170 [the provision allowing the government to impose sanctions on violators] . . . effectively, the information presented by the Secretariat in this factual record reveals that, as a matter of fact, the site abandoned by Metales y Derivados is a case of soil contamination by hazardous waste in relation to which measures taken to date have not prevented the dispersal of pollutants or prevented access to the site, which relates to the issue of whether Mexico is effectively enforcing LGEEPA Article 170.[103]

The disclaimer is consistent with prevailing interpretations of Articles 14 and 15. Factual records are to include only finding of fact and are not to draw legal conclusions.[104]

Two problems arise from this limitation. First, strict focus of the submission process on the allegation of fact in the submissions provides no *legal* determination of Mexico's compliance with NAAEC obligations, in particular its obligations under Article 5. While the petitioner's factual assertions were vindicated virtually in their entirety, their legal significance remains unclear.[105]

Mexico failed to vigorously prosecute the case against New Frontier and to seek extradition of Kahn, as conscientious U.S. staff attorneys in the EPA and Department of Justice would be expected to do. Yet, does Mexico's lax criminal enforcement amount to a failure of effective environmental enforcement? The question is not academic. After all, the NAAEC acknowledges certain excuses or justifications for nonenforcement. It specifically excepts those situations where government officials have engaged in "a reasonable exercise of their discretion in respect to investigatory, prosecutorial, regulatory or compliance matters" or "*bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities."[106]

As an explanation of its failure to pursue Kahn and New Frontier as vigorously as community activists had desired, Mexican officials cited limited resources to monitor, investigate, and prosecute maquiladora plants. In 1993, two lawyers had to handle 800 ongoing proceedings. Mexican authorities may have determined that their scarce resources were best employed in probing other cases, where the environmental im-

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103. Metales Factual Record, *supra* note 7, at 59–60. *Cf. id.*, Comments of the United States of America, attachment 3, at 154.

104. North American Commission for Environmental Cooperation, Citizen Submissions on Enforcement Matters: Submissions Guidelines, Council Res. 99-06, art. 12 (June 28, 1999), *available at* http://www.cec.org/citizen/guide_submit/index.cfm?varlan=english [hereinafter Submissions Guidelines]; *see also* Markell, *Commission, supra* note 47 (discussing the citizen submission process).

105. *Cf.* Markell & Knox, *supra* note 89, at 87.

106. NAAEC, *supra* note 1, at art. 45(1).

pacts perhaps seemed to be more severe and the need for a remedy more urgent. The implication is that the Mexican government made a legitimate and unavoidable judgment call about the appropriate allocation of legal and investigative resources. Vigorous prosecution of Kahn lost out at this decision point.

This explanation, however satisfactory on the surface, misses a larger, systemic defect in the allocation and availability of regulatory resources to Mexican environmental officials. This issue is not new; it has been the subject of international criticism by the OECD and the World Bank.[107] As the factual record points out, "between August 1996 and March 2000, a total of 210 new maquiladoras were built in Tijuana, or an average of one per week, while in that same period the number of inspectors and other personnel of the PROFEPA State Office in Tijuana remained essentially the same."[108] In 2003, there were more than 1,300 maquiladora plants in the Mexican state of Baja California,[109] with most of the plants concentrated along the San Diego–Tijuana border area. The total number of maquiladoras for that year in the six Mexican states that border the United States was in excess of 3,300.[110]

At the same time, the activities of PROFEPA and real government spending on environmental protection have languished. Total spending on environmental protection activities increased several fold during the NAFTA negotiations and the period immediately preceding the agreement's entry into force. Since then, it has dropped steadily, from a high in 1994 to about fifty-five percent of that amount in 1998.[111] Similarly,

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107. *See* Gallagher, *supra* note 97, at 121 (*citing* Organization for Economic Cooperation and Development, Mexico: Environmental Performance Review (1998); World Bank, Mexico: A Comprehensive Development Agenda (2001)).

108. Metales Factual Record, *supra* note 7, at 43–44.

109. Based upon information gathered by Cristina Lopez from Mexican government sources. Sistema de Información Empresarial Mexicano, (June 22, 2003) *at* http://www.siem.gob.mx/portalsiem.

110. *Id.* The six Mexican border states are Baja California, Sonora, Chihuahua, Coahuila, Nuevo Leon, Tamaulipas. In 1996, forty-four percent of all maquiladora employment was located in the three border cities of Juarez (across from El Paso, TX), Tijuana, and Matamoros (across from Brownsville, TX). *See also* Ian MacLachlan & Adrian Guillermo Aguilar, *Maquiladora Myths: Locational and Structural Change in Mexico's Export Manufacturing Industry*, 50 PROF. GEOGRAPHER 315 (1998). The total number of maquiladora plants in Mexico numbered about 4,300 in June 2003, based upon information gathered by Cristina Lopez from Mexican government sources. Sistema de Información Empresarial Mexicano, *at* http://www.siem.gob.mx/portalsiem, up from approximately 2,200 in 1994. *Id.* GARY C. HUFBAUER ET AL., NAFTA AND THE ENVIRONMENT: SEVEN YEARS LATER 41 (2000).

111. *See* Gallagher, *supra* note 97, at 123; *see also* Response of the Administration of George Bush to Issues Raised in Connection with the Negotiation of a North American Free Trade Agreement (May 1, 1991), *reprinted in* NAFTA AND THE ENVIRONMENT: SUBSTANCE AND PROCESS 165 (Daniel Magraw ed., 1995) [hereinafter Response of the Administration] (budget of Mexican environmental agency "increased almost eight-fold between 1989 and 1991 (from $5 million to $39 million)"). Barbara Hogenboom, however, suggests that these numbers may well have been inflated. *See* HOGENBOOM, *supra* note 87, at 234.

plant-level environmental inspections went up about fivefold during 1993, the final year of negotiation of NAFTA, but they have steadily decreased since then.[112] From a high of more than 15,000 environmental inspections a year in 1993, inspections dropped to about half that number in 2002.[113]

A similar trend can be observed with respect to inspection personnel. Until 1991, Mexico had only 109 environmental inspectors to police the entire country.[114] In anticipation of a World Bank loan that year, Mexico added fifty inspectors at the U.S. border and fifty in Mexico City.[115] In 1992, the total number of environmental inspectors at the border increased to 200, four times the number employed there in 1989.[116] But by 1993, even though Mexico reported that it had "a total of 460 inspectors countrywide," the number at the U.S.-Mexico border area had dropped to 130 inspectors.[117] The attrition in the border area from 1993 to 2002 roughly paralleled the drop in the total number of environmental inspections in that same period

Barbara Hogenboom has also suggested that the sheer numbers of inspectors gives a more positive impression of inspection and enforcement activities than is justified. She has pointed to three serious problems:

> First, despite the remarkable expansion of inspecting staff, their number was still insufficient. Most inspections took place in large companies and the most polluting industrial sectors, leaving many companies uninspected.[118] Second, there were problems with contracts, salaries and payment of inspectors, which enhanced corruption. In November 1991, for instance, it was reported that SEDUE had cut 48 per cent of its inspection personnel. Of the border inspectors only about one-fifth worked as full-time government employees, while the rest worked under contract, and many of them had to wait months to receive their salaries. Third, most inspectors were still

112. *See* Gallagher, *supra* note 97, at 122. Gallagher also points out that inspections peaked in 1993 at only 6 percent of all firms in the country. *Id.* at 122.

113. *Compare id.* at 122 (more than 15,000 inspections in 1993) with information gathered by Cristina Lopez from the PROFEPA Web site, http://www.profepa.gob.mx/seccion.asp?sec_id=213&it_it=494&com_id=0 (last visited June 23, 2003) (7,619 inspections in 2002) (information also on file with author).

114. *See* International Activities Division of the United States EPA, Evaluation of Mexico's Environmental Laws and Regulations—Interim Report of EPA Findings (Nov. 22, 1991), *reprinted in* NAFTA AND THE ENVIRONMENT: SUBSTANCE AND PROCESS 186 (Daniel Magraw ed., 1995).

115. *See* Response of the Administration, *supra* note 111, at 163, 165, 170.

116. Report of the Administration on NAFTA, *supra* note 96, at 239, 249–50, 260.

117. The NAFTA: Report, *supra* note 97, at 452.

118. It is often suggested that "many smaller firms are more pollution intensive." *See* Gallagher, *supra* note 97, at 124; *see also* HUFBAUER ET AL., *supra* note 110, at 53–54.

> badly trained, while those that were well-trained were soon offered a better contract in the private sector.[119]

A conservative estimate is that in the early 1990s, when Mexico issued the criminal indictment against Kahn and when the maquiladora industry was already in full swing, the number of plants in the San Diego–Tijuana border area should already have numbered upwards of 500. To allocate only two lawyers and six inspectors and other staff to monitor, inspect, and pursue enforcement actions for this region, as the Metales factual record sets out, seems woefully inadequate. Given the obvious and foreseeable environmental regulatory oversight needs of a booming industrial area, and considering the tax revenue streams that these plants were generating for the Mexican government, the failure to allocate more resources to regulatory oversight and enforcement suggests willful neglect of potential environmental concerns.[120]

If a conscious allocation of regulatory and enforcement resources of this type qualifies as a legitimate exercise of enforcement discretion or as the bona fide allocation of enforcement resources, the NAAEC's effective enforcement obligation will have little meaning. Undoubtedly, the situation has improved over the years.[121] Whether past or present enforcement levels are adequate, however, is the very question that the factual record left unanswered. Without legal conclusions, the Mexican government can continue to maintain not only that there has been no breach of its obligations under the NAAEC but also that it is hardly to blame for the problems at the Metales site. No definitive resolution of the critical assertions by the submitters—that there has been a breach of NAAEC obligations—and the rebuttal by Mexico—that its actions were authorized under the exceptions set out within the NAAEC itself—is possible. Attempts to pressure or shame Mexico into more active engagement in environmental regulation and enforcement are deprived of significant force. After all, according to Mexico's position, it did nothing wrong and therefore has nothing to be ashamed of.

The second problem arising out of the failure to articulate legal conclusions is that more formal response measures are unlikely to be initiated. Factual records that evidence a persistent failure by one party to

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119. HOGENBOOM, *supra* note 87, at 235 (citations omitted).

120. This also seems to suggest that expectation that NAFTA's "obligations regarding effective enforcement [would] help to guarantee Mexico's continued progress in the development of its environmental enforcement program" were misplaced. The NAFTA: Report, *supra* note 97, at 393.

121. *See id.* Nevertheless, Hogenboom also questions whether the improvements have resulted in actual progress of industrial compliance with regulatory requirements. HOGENBOOM, *supra* note 87, at 236–37. She notes that Mexican officials estimate that "more than 90 percent of Mexican industry did not comply with the ecological norms for management of contaminated residuals" in 1993. *Id.* at 237.

effectively enforce its environmental laws may lead another party to trigger the NAAEC's formal Part V bilateral consultation and dispute settlement processes. Such consequences form the logical link between the monitoring function of the submission process and the substantive remedies, formal sanctions, for the treaty breach.[122]

In the Metales case, the acknowledged understaffing and underresourcing of enforcement offices arguably constitutes a pattern of persistent enforcement failures. If enforcement resources are inadequate, enforcement failures are bound to be persistent and give rise to a pattern of failures to intervene. Nevertheless, neither the United States nor Canada has initiated a Part V action.

Over the ten-year existence of the CEC, despite the numerous submissions filed in that time, Part V processes have never been triggered. Moreover, as discussed in more detail below, it is unlikely ever to happen based on the public choice dynamics of the process. The failure of factual records to draw legal conclusions exacerbates such difficulties.

Narrow substantive scope. The second problem of the factual record's scope arises out of its narrow substantive view of relevant government actions. The resulting picture of what led to the enforcement failure is narrow and incomplete.

As David Markell has elaborated, much of that trend has emerged since November 2001,[123] when the CEC issued a set of resolutions authorizing preparation of records in five submissions.[124] According to Markell, the CEC Council changed, substantially limited, or redefined "the scope of the factual records to be developed" from the submitters' focus and the Secretariat's recommendation:

> While the submitters asserted that broad, programmatic failures to effectively enforce particular environmental laws exist[ed], and while

122. Lack of effective environmental enforcement would result in a de facto lowering of environmental standards compared to jurisdictions with similar standards but more stringent enforcement policies. A NAAEC party that persistently fails to effectively enforce its environmental laws would put businesses in its jurisdiction at a competitive advantage over businesses elsewhere and capture attendant economic benefits. Accordingly, NAAEC parties that become aware of a pattern of effective enforcement failures could be expected to resist such unfair regulatory and enforcement tactics by initiating Part V bilateral consultation and dispute settlement processes.

123. *See* John D. Wirth, *Perspectives on the Joint Public Advisory Committee, in* GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 199, 207 (David L. Markell & John H. Knox eds., 2003); David L. Markell, *The CEC Citizen Submission Process: On or Off Course?, in* GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 274, 275–80 (David L. Markell & John H. Knox eds., 2003) [hereinafter Markell, *CEC Citizen Submission Process*].

124. North American Council for Environmental Cooperation, Council Res. 01-08 to 01-12 (Nov. 16, 2001), *at* http://www.cec.org/who_we_are/council/resolutions/index.cfm?varlan=english&year=2001.

> the Secretariat recommended that these asserted widespread failures to effectively enforce be investigated through development of factual records, the Council resolutions decline[d] to direct the Secretariat to develop factual records on such broad, programmatic alleged failures to effectively enforce.[125]

The Metales submissions, including the Council resolution authorizing the factual record, predate these developments. Nevertheless, the trends are evident in two respects even in the Metales factual record: (1) the exclusion of issues related to the extradition efforts on Kahn and (2) U.S. enforcement failures.

First, the submitters requested the development of a factual record with respect to Mexico's failure not only to vigorously pursue Metales and Kahn for the regulatory violations but also to seek his extradition once Kahn had fled its jurisdiction. The CEC excluded the second issue.

The Commission's main justification was the allegedly inadvertent legislative repeal of the underlying substantive environmental provision.[126] The action was in keeping with its prior decisions not to develop factual records of submissions where the alleged effective enforcement failures were due to legislative repeals of the underlying substantive environmental law.[127] Their obvious importance to the Mexican government's overall handling of the matter was deemed irrelevant.

Second, the factual record's primary focus on Mexican enforcement failures suggested that all the substantive blame lay with Mexico. The United States was allowed to escape virtually all accountability, even though much of the Metales waste originally came from across the border. However, to the extent that U.S. and California officials allowed the export of the wastes when they might have prevented it, responsibility must be shared.

The Los Angeles County District Attorney's Office did bring a criminal indictment against Jose Kahn and New Frontier in 1992, resulting in a guilty plea, a $50,000 fine, and probation conditions that required various environmental remedial actions at the Metales site. Unfortunately, the most significant condition, repatriation of the wastes to the United States, was never fulfilled. Given that Kahn's exploits involved the crossing of an international boundary and the dumping of wastes that are usually regulated by the EPA, why were Kahn and New

125. Markell, *CEC Citizen Submission Process*, *supra* note 123, at 276–77.

126. Metales Factual Record, *supra* note 1, at 14 n.2, 15–16.

127. *See* North American Commission for Environmental Cooperation, Citizen Submissions on Enforcement Matters: Spotted Owl (Sept. 21, 1995), *available at* http://www.cec.org/files/pdf/sem/95-1-DET-E1.PDF (discussing Secretariat Determination under Article 14(2)).

Frontier not stopped sooner? Why were they never the subject of an EPA federal enforcement action?

One response is that a federal enforcement action might not have been viable.[128] It has been commonly accepted that the wastes came from the United States; however, specific evidence has been scarce.[129] Moreover, information about the recycling operation at Metales has not been publicly available. How Metales processed the used batteries and other lead wastes, its financial viability, and its environmental practices would have been relevant to the bona fide nature of recycling at Metales. Although the export of hazardous wastes is subject to a notification scheme under Annex III of the La Paz Agreement,[130] materials destined for recycling operations are generally not considered hazardous waste.[131] Proof that Metales y Derivados was not a bona fide recycling operation would have been critical to a successful enforcement case.[132]

The 1992 California indictment suggests there was at least enough to justify a prosecution under that state's environmental laws.[133] Nevertheless, Kahn's guilty plea in the state proceeding has prevented the public airing of the evidence against Kahn, and an independent assessment of the strength of a federal environmental enforcement action against him is not easy to make.

The prosecutorial justifications for not moving forward with a federal enforcement action against Kahn do not in themselves, however, justify ignoring the issue in the submission process. The very purpose of a factual record is to probe not only the factual basis of the submitter's allegations but also the factual basis and reasoning behind the actions and inactions of the party concerned.[134] Documentation of the contamination at the site, and the events that led to the contamination, is crucial to a thorough assessment of the Mexican government's failure to vigorously

128. Interview with John Rothman, Regional Counsel's office, EPA Region IX (Mar. 4, 2004).

129. Information about the total quantity of wastes shipped by New Frontier and Kahn to Metales from the United States would also have been relevant, but quite difficult to come by. Since such information would be a measure of the environmental harm, it could have influenced any potential penalty size.

130. Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area, Nov. 12, 1986, U.S.-Mex., art. III, 26 I.L.M. 16, 25 [hereinafter Annex III to La Paz Agreement]. In the absence of the Annex III, section 3017 of RCRA would have required similar notification to the importing country. 42 U.S.C. 6938(g) (2004).

131. *See* Lisa T. Belenky, *Cradle to Border: U.S. Hazardous Waste Export Regulations and International Law*, 17 BERKELEY J. INT'L L. 95 (1999).

132. Moreover, since EPA's RCRA regulations contain a specific exemption for the recycling of lead acid batteries, the kind that were also found at Metales, an enforcement action would have to look to the more difficult-to-trace lead slag as the primary evidence. 40 C.F.R. 266.80 (2004); 40 C.F.R. 261.6(a)(iv) (2004); *see also* Belenky, *supra* note 131, at 105–06.

133. Litigation discovery proceedings might have revealed more information.

134. *See, e.g.*, Submissions Guidelines, *supra* note 104, art. 12(1)(b).

prosecute Kahn and New Frontier. The lack of such factual findings with respect to the original battery and lead waste shipments to Metales effectively prevents any questioning of the enforcement decisions by the U.S. government. The public is deprived of an opportunity to examine for itself the persuasiveness of the underlying reasoning.

Could an assessment of U.S. actions have been appropriately included in the Metales record? The EHC, in its citizen submission to the CEC, failed to incorporate explicit allegations that the United States failed to effectively enforce its environmental laws.[135] Nevertheless, the Secretariat could have investigated these issues on its own initiative. The charge of the Council with respect to the development and scope of the factual record would not, on its face, have foreclosed such an inquiry.[136] Moreover, investigation of U.S. enforcement would have made efficient use of Commission resources because it might avert a second duplicative submission focusing specifically on the United States.

A substantive objection to the inclusion of an assessment of U.S. enforcement arises from the NAAEC's explicit affirmation of the principle of territorial sovereignty. Insistence that each party to the NAAEC be solely responsible for the enforcement of the laws within its own territory, including environmental laws, is arguably an extension of the sovereignty principle. Hence, allegations of an enforcement failure by one party should, by this reasoning, lead to investigations of the actions and inactions of that particular subject government.

The premise, however, that it is possible to assess the effectiveness of a nation's environmental enforcement efforts in the abstract, and in isolation from the actions of other states, is faulty. In a case of alleged transboundary misconduct, as arises in the international trade in hazardous waste, the failure to bring enforcement actions in the country of origin can make the job of law enforcement authorities in the country of destination that much harder. In fact, that has been the very premise of U.S. drug enforcement authorities' complaints about inadequate interdic-

135. There are reasons of structural bias why a submitter might want to limit the target of their submission to a single party rather than to seek a more broadly inclusive factual record. Given that the development of a factual record requires the affirmative support of at least two of the three NAAEC parties, expanding a submission to a second party could increase the likely influence of self-interested behavior on Council decision-making. *Id.* at art. 15(2). Unlike a submission targeting one party, when two disinterested parties can over-ride the submission target's negative vote, a submission targeting two parties might result in the two target states blocking the development of a factual record.

136. North American Commission for Environmental Cooperation, Citizen Submissions on Enforcement Matters: Metales y Derivados, Council Res. 00-03 (May 16, 2000), *available at* http://www.cec.org/files/pdf/sem/98-7-Res_en.pdf; North American Commission for Environmental Cooperation, Citizen Submissions on Enforcement Matters: Metales y Derivados, Overall Workplan for Factual Record 1 (May 30, 2000), *available at* http://www.cec..org/files/pdf/sem/98-7-dev-e.pdf ("relevant facts that existed prior to 1 January 1994, may be included in the factual record").

tion activities in other countries, including Mexico. Such examples suggest that judgments about fault and the normative and legal responsibility for failures to engage in effective environmental enforcement efforts cannot be made without reference to the actions of others.[137]

Here, the causes of the Metales situation cannot be fully understood without examining the actions and mutual expectations of both countries. For example, Annex III to the La Paz Agreement explicitly acknowledges the necessity for bilateral efforts and imposes reciprocal obligations to control trade in hazardous wastes.[138] Failure to cooperate would undermine each nation's individual efforts. If Mexico reasonably relied on U.S. commitments under the La Paz Agreement, failure to enforce U.S. environmental laws ought to be viewed as contributing to enforcement failures on the Mexican side of the border, possibly by overwhelming the resources of enforcement authorities there. The actions or inactions of the United States would thus be relevant to the problems at Metales and an appropriate area of inquiry for a factual record.

Unfortunately, the Metales factual record lacks such pertinent information. It falls considerably short of achieving the transparency that is the overall goal of the submission process.[139] The complete context necessary to fairly allocate responsibility and to select appropriate remedies, including what U.S. officials could do to prevent a recurrence of these problems, is not available.[140] It is, therefore, questionable whether the process is capable of achieving even the narrow goal of improving the enforcement of national environmental laws.

3. The Failure to Broaden Environmental Governance

It is also questionable whether the submission process has achieved a third goal of transparency: the broadening of environmental governance to allow more people, especially those directly affected by regulatory policies, to participate in decision making.[141]

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137. For example, there are well-established legal principles, such as in tort law, suggesting that legal responsibility of one actor is not necessarily vitiated by the intervening actions of another, especially when such intervening actions were reasonably foreseeable. *See, e.g.*, Marshall v. Nugent, 222 F.2d 604 (1st Cir. 1955); Sears v. Morrison, 90 Cal. Rptr. 2d 528 (Cal. App. 3 Dist. 1999) (rescuers foreseeable).

138. *See* Annex III to La Paz Agreement, art. II, § 2 ("[E]ach Party shall ensure, to the extent practicable, that its domestic laws and regulations are enforced with respect to transboundary shipments of hazardous waste and hazardous substances . . . . ").

139. From a macroscopic, systemic perspective, it provides no contextualized account of how regulatory and enforcement policies can have transboundary effects.

140. For example, it might also have been appropriate to examine the effectiveness of HAZTRAKS, a bi-lateral tracking system for hazardous waste, as well as the operation of the La Paz Agreement.

141. *But see* Donald McRae, *Trade and the Environment: The Issue of Transparency, in* GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL

The submission process is clearly an important advance.[142] Private individuals may trigger the submission process, which in turn may lead to a factual record.[143] The public may also provide information to the Secretariat during the preparation of the factual record.[144] While the information that citizens submit need not be incorporated in the factual record, the Secretariat is likely to do so in the interest of accuracy and completeness. In the Metales matter, the information-gathering process by the Secretariat was wide-ranging and included requests for information from many private entities as well as governmental agencies.[145]

Yet a modicum of improvement in public participation does not equal success for the submission process. Success and effectiveness must also be judged by reference to expectations created during the adoption of the NAAEC. For example, in congressional testimony extolling the NAAEC's benefit, EPA Administrator Carol Browner stated that "NAFTA and the [NAAEC] side agreement . . . embrace public participation . . . . There is real opportunity for public involvement.[146]

The submission process has fallen far short in this regard. Expectations about significant opportunities for public participation have generally not been met.[147] Neither the public nor the submitters have any right to shape the factual record with respect to its scope or its findings. Nobody has a right to participate in the decision to authorize development of a factual record; it is entirely within the discretion of the Council.[148] In the event that the Secretariat determines that development of a

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COOPERATION 237, 249 (David L. Markell & John H. Knox eds., 2003). McRae sees the "concept of transparency [as] related to access to information and participation in the processes of environmental decision-making, and it is linked to the role played by nontraditional international actors." *Id.* at 238–39. McRae includes in the concept: "1) the opportunity to initiate processes that will lead to decision-making or that will contribute to ensuring compliance with environmental standards; 2) access to information; 3) the opportunity to contribute information to an environmental decision-making process; 4) participating in forums in which decision-makers consider information and hear arguments; and 5) participating in the making of the actual decision that has an environmental impact." *Id.* at 239.

142. *See, e.g.*, Raustiala, *supra* note 86, at 267.

143. NAAEC, *supra* note 1, at art. 14(1).

144. *Id.* at art. 15(4).

145. Metales Factual Record, *supra* note 7, at 77, 89 apps. 4, 6.

146. *Environmental Implications, supra* note 96, at 15–16 (statement of Carol Browner, Administrator, EPA).

147. Another measure of success might also be reference to the present levels of public participation in other environmental agreements (virtually none) or the opportunity costs—what other, more effective measures could have been incorporated. The submission process is a clear advance over existing public participation mechanisms in other agreements. But there is a question as to whether continued public NAFTA opposition, especially in light of what the public and environmental community now knows about the submission process, might not have resulted in a mechanism that assured greater public input. *Cf.* Markell, *CEC Citizen Submission Process*, *supra* note 123, at 274–88.

148. NAAEC, *supra* note 1, at art. 15(2); Submissions Guidelines, *supra* note 104, at art. 10.1. Neither the terms of the NAAEC themselves nor the citizen submissions Guidelines ap-

factual record is not warranted, or if the Council disagrees with the Secretariat's recommendation to develop a factual record, no formal appeal or process for reconsideration is available. State parties may review the draft of the factual record and comment on its accuracy before a final version is submitted to the Council; the public does not.[149] Finally, the contents of the factual records are secret until they are released to the public by decision of the Council.

The result is a report that has not been scrutinized and has not otherwise benefited from public input other than in the barest essentials. The public is largely shut out. The factual underpinning of the implicit legal and policy conclusions have been shaped only by the Secretariat and the NAAEC party governments. [150] In fact, if certain interests and concerns of the public are not shared or represented by the Secretariat and government officials, they are not likely to be reflected in the factual record.

The substantive consequences of these limitations are apparent in the Commission's decisions to exclude the extradition issue from the Metales factual record. Even though the submitters disagreed with the CEC's decision about the factual record's scope, there was no means to express this formally. After all, the contents of the factual record were secret until the Council had approved it for publication.

The most troubling implications of the public's lack of involvement in these key decision points, however, only become apparent when the justification for excluding the extradition issue is carefully examined. The sole articulated reason was Mexico's say-so.[151] The factual record contains no other justification. There is no discussion of why such an inadvertent legislative enactment should have the asserted retroactive effect, no explanation of why the Mexican government's position is correct as a matter of Mexican law or why Mexico's assertion should be authoritative. Nor is there any reference to relevant judicial determinations. In essence, the public and the submission's originators are required to ac-

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proved by the Council provide any criteria guiding such decisions. However, the Submissions Guidelines also suggest that the Council will provide the public with its reasons for instructing the Secretariat to develop a factual record or not. *Id.*

149. NAAEC, *supra* note 1, at art. 15(5).

150. For example, as Donald McRae has pointed out, "a determination of admissibility, a determination of whether to request a response from the Party concerned, and a determination to recommend to the Council that a factual report be prepared all involve potential issues of the interpretation of the NAAEC." McRae, *supra* note 141, at 248.

151. Metales Factual Record, *supra* note 7, at 14 n.2. Furthermore, even though the operative environmental provision might have been repealed in 1996, as asserted by the Mexican government, there is no question that the same provision was legally effective prior to that time, including the entire time period when Jose Kahn and Metales were the subject of the various notices of violations and when the original arrest warrant was issued.

cept the assertion's validity on faith, without having any opportunity to challenge it.[152]

To its credit, the CEC's factual record did question Mexico's asserted legal interpretation of a separate statutory claim in the submission.[153] Although the factual record did not assert that Mexico's interpretation of that other issue was actually incorrect, Canada forcefully stated that "[i]t is not appropriate nor consistent with the spirit of the NAAEC for the Secretariat to challenge the interpretation a Party gives of its domestic legislation."[154] The need to maintain the independence of the fact-finding process and the self-serving nature of Mexico's legal interpretation were of little concern.

The extradition issue also illustrates another means by which the party subject of a submission can reduce or avoid public participation and thus limit its accountability:[155] designation of certain information as

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152. In this respect, the CEC's decision in the Spotted Owl submission, SEM-95-001, where no factual record was developed on a limited legislative repeal (the "Recissions Act"), is inapposite. *See* Markell, *Commission*, *supra* note 47, at 554–55; Kal Raustiala, *International "Enforcement of Enforcement" Under the North American Agreement on Environmental Cooperation*, 36 VA. J. INT'L L. 721, 725–26 (1996). There, even the submission's originators agreed that legislative action prevented enforcement of the relevant environmental statute. Petition Pursuant to Article 14 of the North American Agreement on Environmental Cooperation, Spotted Owl Submission, SEM-95-001 (June 30, 1995) (petition from Biodiversity Legal Foundation et al. to the Secretariat of the Commission for Environmental Cooperation), *available at* http://www.cec.org/files/pdf/sem/95-1-SUB-EO.pdf (last visited November 14, 2004). Thus, while the submission's originators may have disagreed with the CEC about the legal implications of the Recissions Act with respect to the United States' obligations to "effectively enforce" its environmental laws, there was no disagreement about the Recissions Acts' domestic legal consequences in preventing enforcement under US law. In Metales, however, the legal consequences under domestic Mexican law of the asserted legislative repeal was never aired and examined publicly because the claim itself was kept secret for such a long time.

153. With respect to the enforcement authority set out under section 170 of the LGEEPA, Mexico maintained that the statutory language granting enforcement power to its environmental officials was completely discretionary in nature. It pointed to the use of the word "may" in LGEEPA Article 170 rather than "shall." Metales Factual Record, *supra* note 7, at 50. The Commission disagreed. While "[n]o specific judicial interpretation of LGEEPA Article 170" nor "of the word 'may' in the context of environmental law" more generally exists, the factual record pointed out that the Mexican government's simplistic interpretation was inconsistent with Mexican judicial interpretations of the word in the area of taxation. *Id.* at 50. Thus

> [t]hese courts have established that the word "may" is not to be interpreted in a purely grammatical sense, but that rather, its interpretation on the nature of the powers invested in the authority. They have indicated that discretionary powers shall not be confused with the use of judgment. Along the same lines, another case law criterion indicates that the powers of the authority must be interpreted with reference to the express purpose that the norm seeks to achieve.

Id. at 50–51 (citations to Mexican cases omitted).

154. *Id.* at 149, attachment 2.

155. Another tool, less readily applied, is delay or failure to cooperate in the preparation and publication of the factual record. While the target party is required to advise the Secre-

confidential.[156] By doing so, the Mexican government prevented public dissemination of its response for more than two years.[157] It was not until three months before release of the draft factual record to the NAAEC parties, and five months before completion of the final factual record, that the public had access to Mexico's response, including its argument that the extradition issue was not a proper subject of the factual record.[158]

The upshot is that even if the public was eventually apprised of the substantive contents, Mexico's assertions remained unchallenged for two years. The delay seriously prejudiced the ability of the submission's originators and others to respond and to provide countering perspectives.

Designations of confidentiality not only protect information from public disclosure; they can also effectively impede the use of that information in the development of the factual record. They allow a party to shield its justifications, explanations, and excuses for enforcement failures from public scrutiny and challenge. In the end, delay and confidentiality designations can blunt or even avoid the embarrassment and shame that development of a factual record might create.

A careful examination of Metales shows that the success of the citizen submission process and published factual records must be viewed with circumspection. Their ability to achieve the primary goal of transparency—that is, the revelation of specific events, circumstances, and processes that occurred during environmental enforcement proceedings—is clear. Nevertheless, the Metales matter suggests that they have not necessarily led to greater accountability with respect to the achievement of the ultimate substantive goals of transparency: (1) substantive improvement or remediation of the environment, (2) enhanced environmental enforcement efforts, and (3) broad public participation in environmental governance. The design of the citizen submission process has left many opportunities for the parties to subvert and compromise its effective operation.

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tariat within sixty days as to whether the subject matter of the submission is also the subject matter of a pending judicial or administrative proceeding and is invited to provide any other relevant information, it is required to submit no other information. *See* NAAEC, *supra* note 1, at art. 14(3). In effect, the failure of a target party to cooperate in the factual investigation can vastly complicate or delay the development of the factual record.

156. *See id.* at art. 39(2); Submissions Guidelines, *supra* note 104, at art. 17(2), (4).

157. Metales Factual Record, *supra* note 7, at 9 n.1. Mexico's response was kept confidential from the time it was submitted to the CEC on June 1, 1999 to June 28, 2001. This was not the first time Mexico took this step. *See* Knox, *supra* note 6, at 89.

158. The Secretariat completed its draft factual record on October 1, 2001, with the comments by the NAAEC parties incorporated into the final factual record and submitted to the Council on November 29, 2001. Approval for public release came only on February 7, 2002. Metales Factual Record, *supra* note 7, at 143–50 attachments 1–2; Markell, *CEC Citizen Submission Process*, *supra* note 123, 291 app. A.

III. UNDERSTANDING THE FAILURES OF THE METALES MATTER

The Metales case demonstrates that the citizen submission process has managed to increase regulatory enforcement transparency without accomplishing the underlying triple goal of improved environmental quality, enhanced enforcement, and broadened environmental governance. To those who held out hope that the process would address the expected environmental ills of NAFTA, its failures are surprising and disheartening.

A close inquiry into the nature of international institutions, including the dynamics of treaty enforcement and the political accountability of international organizations, the political economy of the border region, and the operation of markets and social norms, suggests that these outcomes should have been expected. First, the nature of international institutions and the international legal system creates difficulties in enforcing environmental treaties as well as ensuring the political accountability of such institutions to particular individuals and communities. Second, the political economy of the U.S.-Mexico border region and the marginalization of the communities living there are an inherent obstacle to the effective functioning of governmental and regulatory processes. Third, the operation of markets and social norms is not conducive to promoting voluntary compliance in situations such as Metales.

A. The Nature of International Institutions

The nature of the NAAEC as an international organization, and of the citizen submissions as an international process, presents two challenges. First, the submission process is a weak device to coerce a party's compliance with the obligation "to effectively enforce its environmental laws and regulations through appropriate government actions."[159] Second, the Secretariat and the Council members are largely insulated from political accountability for their actions with respect to the submission process.

1. The Difficulties of Enforcing the NAAEC

The difficulties of promoting compliance with the effective enforcement requirement, or of inducing substantive environmental remedial efforts, are attributable to the weak coercive action of transparency and to the public choice of enforcement.

159. NAAEC, *supra* note 1, at art. 5(1).

a. Citizen Submissions as a Mechanism to Monitor and Induce Compliance

For U.S. environmental lawyers, it is tempting to compare the submission process to the citizen suit provisions contained in many U.S. environmental statutes. Like citizen suit provisions generally, the NAAEC submission process grants private individuals a role in instances where the government has failed to bring appropriate environmental enforcement action. Private individuals are empowered through the submission process to take the government to task for its enforcement failures.

That is where the analogy ends. Unlike U.S. citizen suits, submissions to the CEC cannot in themselves result in substantive remedies, whether they be penalties, environmental remedial orders, or other types of injunctive relief. A factual record is the only successful outcome.[160] Moreover, the submission process does not anticipate the submitters' active participation in the fact-finding process. Once a submission has been filed, the process is entirely controlled and managed by the Secretariat and the Council.[161]

Accordingly, the submission process has more appropriately been described as a complaint-based monitoring system[162] or likened to a fire alarm triggering an investigation into a party's compliance with treaty obligations.[163] Its functions serve primarily to alert NAAEC parties and the Secretariat to instances of noncompliance rather than to enforce the obligations of the NAAEC.

Nevertheless, characterizing the submission process solely as a mechanism to generate information about the parties' national environmental enforcement behavior and policies would not fully capture its utility. Submissions clearly have the potential to do more than that. Submissions and published factual records can serve as informal means of inducing compliance. Public exposure of noncompliance may result in disapproval by the public and may shame responsible officials into compliance.

It may also trigger other responses. Private individuals may organize informal private boycotts, bring formal legal actions under domestic law, or even seek to hold public officials accountable through electoral politics. Other states may use noncompliance information to pressure responsible officials through diplomatic means, threaten formal or informal punitive measures, or withdraw or block international cooperative endeavors. Information about noncompliance generated by the submission

160. *See id.* at art. 14–15; Knox, *supra* note 6, at 84–85.
161. *See* NAAEC, *supra* note 1, at art. 14–15.
162. *See* Knox, *supra* note 6, at 11.
163. Raustiala, *supra* note 86, at 267.

and the factual record is in all instances a prerequisite and justification for such negative responses.

The submission process is an integral component of efforts to sanction or otherwise induce compliance. Unfortunately, the unremediated lead and heavy-metal wastes at the Metales site and inaction in Kahn's prosecution demonstrate that even if transparency is a necessary condition, it is not in itself sufficient.

b. The Weak Coercive Force of Transparency Alone

The most obvious explanation for these difficulties is the weak coercive power of transparency.[164] Disapproval and shame may erode a state's national and international standing and an individual official's personal reputation.[165] They will be less able to command respect and influence among their peers. Their promises and assertions may become less credible, and their participation and cooperation in international institutions may become less desired by others. These consequences, however, are usually indirect and subtle. Rarely are immediate and significant effects directly attributable to public disapproval and shame.

Exposure of misdeeds may also trigger fear of other potential adverse responses, be they formal or informal. But such fear is unlikely to be great unless the risk of adverse consequences is significant. If the deterrent value of punitive responses is small and does not outweigh the benefits of the misdeed, changes in behavior by governments and government officials will typically not occur.

The Metales case confirms these expectations. Ever since the residents of Colonia Chilpancingo were first affected by the pollution emanating from Metales, protests at the facility and requests for government action have abounded. After the EHC filed the citizen submission in 1998, the matter also began to garner attention in the U.S. national media through stories on National Public Radio and in the *Wall Street Journal*, *Los Angeles Times*, and *Washington Post*.[166] A 1999 conference on environmental justice at the U.S.-Mexico border, cosponsored by the EPA

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164. *See, e.g.*, A. Dan Tarlock & John E. Thorson, *Coordinating Land and Water Use in the San Pedro River Basin, in* GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 231 (David L. Markell & John H. Knox eds., 2003).

165. *See generally* Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002) (proposing theory that states are concerned about the reputational and direct sanctions that follow violation of international law).

166. *All Things Considered* (National Public Radio broadcast, Oct. 21, 1998); Marc Lifsher, *Groups Use NAFTA in Move To Clean Up Border Plant*, WALL ST. J., Oct. 21, 1998, at CA1; Ken Ellingwood, *California and the West: Mexico Accused of Failure to Clean Up Plant Environment: Groups on Both Sides of Border Hope NAFTA Agreement Will Lead to Removal of Lead Slag and Debris Near Homes*, L.A. TIMES, Oct. 22, 1998, at A3; Kevin Sullivan, *A Toxic Legacy on the Mexican Border*, WASH. POST, Feb. 16, 2003, at A17.

and the National Environmental Justice Advisory Council, drew the attention of the Mexican environmental agency PROFEPA, as well as U.S. state and local officials, to the problems at Metales.[167] The EPA and Mexican government officials have repeatedly met on the Metales matter, going as far as to discuss site cleanup options and the associated costs. Politicians, labor unions, and faith-based organizations have also visited the site.

PROFEPA covered up the wastes with plastic tarps, repaired some fencing, and installed warning signs. In recent years, members of the Mexican parliament have also publicly expressed support for legislation creating a cleanup fund, similar to the U.S. Superfund, for abandoned hazardous-waste sites. Concrete legislative action, however, has not yet been taken. Nor has public exposure resulted in any substantive governmental remediation.

Colonia residents also requested intervention by the EPA. But since the site is situated outside the United States, the EPA's formal response has been that Superfund monies are unavailable. In a turnaround, however, EPA agreed at the end of February 2004 to provide $85,000 for planning of an eventual cleanup and for stabilization of the wastes at the site.[168] While the contribution is encouraging, it will not be nearly enough to cover the most rudimentary remediation option.

c. The Public Choice of Enforcement

Transparency and exposure of noncompliance can also trigger formal, strong coercive responses by other state parties, such as the NAAEC Part V dispute settlement process. Availability of such processes, however, does not necessarily mean they will be applied when noncompliance occurs.

There are three general obstacles.[169] First, deterrent sanctions are public goods.[170] Their application raises problems of collective action

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167. NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL, BORDER ENVIRONMENTAL JUSTICE REPORT (2003), *available at* http://www.epa.gov/Compliance/resources/publications/ej/nejac-ej-border-report.pdf (last visited January 5, 2005).

168. Sandra Dibble, *EPA Grant to Help Otay Revive Abandoned Smelting Operation*, SAN DIEGO UNION-TRIB., Feb. 27, 2004, at B3; personal conversation with John Rothman, Regional Counsel's office, EPA Region IX (Mar. 4, 2004).

169. Tseming Yang, International Treaty Enforcement as a Public Good: The Role of Institutional Deterrent Sanctions in International Environmental Agreements (unpublished manuscript).

170. *See generally* DOUGLAS BAIRD ET AL., GAME THEORY AND THE LAW (1994); RUSSELL HARDIN, COLLECTIVE ACTION (1982); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1971).

and strategic behavior.[171] The harm to the environment from one party's noncompliance with the terms of an international environmental treaty is borne by all other treaty parties. Oftentimes, the costs for any one party to respond to noncompliance by imposing sanctions are much greater than the marginal hassle to each individual treaty party.[172] For example, application of deterrent sanctions such as trade embargoes entails direct costs in the form of lost trade with the noncompliant party, as well as indirect costs if the noncompliant party retaliates.[173] The cost-benefit calculus typically will not favor an enforcement action, so the probability that any one party will individually and independently initiate such action and impose sanctions is small.

At the same time, collective responses, which can distribute the costs of sanctions among several parties to the treaty, may be stymied by free-rider problems. Parties that do not join in the sanctions response also do not share in the costs. Nevertheless, if the violating party comes into compliance, they will benefit from any positive outcome, including improved environmental quality. Thus, it is within each party's narrow self-interest to shirk its responsibility.[174] Unless states can be coerced or otherwise induced to participate, collective mechanisms are unlikely to be an effective response to noncompliance.[175]

Second, this situation presents a classic second-order collective action problem.[176] It usually arises in the context of a primary collective action problem, here the protection of the environmental commons that the treaty system is designed to address in the first instance. Because the problem of enforcement is embedded within the treaty, it is second order in nature. The problem of imposing deterrent sanctions does not arise until after a treaty breach has occurred—that is until after the solution to the primary collective action problem has failed. Because deterrent sanctions usually cannot be created and "stored" in advance and in anticipation of their need, the collective action problem also cannot be resolved before a breach occurs. In other words, it cannot be solved by first-order action.

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171. *See* Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 352–53 (1997).

172. This is the converse of the situation Garrett Hardin described in *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

173. *See* MARGARET P. DOXEY, INTERNATIONAL SANCTIONS IN CONTEMPORARY PERSPECTIVE 26–27, 100–02, 106–09 (1987); *see also* ROBERT AXELROD, THE EVOLUTION OF COOPERATION 37, 183 (1984).

174. *See* DOXEY, *supra* note 173, at 106–09.

175. There are some mitigating dynamics, such as iteration and long-term relationships. *See, e.g.*, AXELROD, *supra* note 173, at 187–89; BAIRD ET AL., *supra* note 170, at 159–87.

176. *See* AXELROD, *supra* note 173, at 28–29; *see also* James D. Fearon, *Bargaining, Enforcement, and International Cooperation*, 52 INT'L. ORG. 269 (1998).

Third, many of the benefits of treaty enforcement—such as the strengthening of the rule of law, the reinforcement of norms of conduct, and the promotion of voluntary compliance—are difficult to value or are incommensurable.[177] In environmental treaties, difficulties in quantifying environmental harms compound these problems. Disagreements over the value to be measured (aesthetic pleasure, environmental services provided by ecological systems) and the methodology of measurement (such as contingent valuation) abound even within the U.S. environmental regulatory system.[178] Perspectives that assign noneconomic values to nature, as do proponents of animal rights, environmental ethics, or cultural values in the environment, further complicate such inquiries. In the absence of a consensus about values and the criteria for measuring them, an adequate analysis of, much less agreement on, the need for enforcement will be elusive. Such obstacles are likely to result in an undervaluation of enforcement and, in turn, underenforcement of treaty obligations.

The failure of the United States and Canada, individually or jointly, to trigger Part V bilateral dispute settlement processes is consistent with the public choice of enforcement. Neither state has a vital interest in pursuing such a process, even though the allocation of inadequate resources to environmental enforcement efforts in the U.S.-Mexico border region seems to be systemic and to provide maquiladora industries with a competitive advantage over their United States or Canadian counterparts.[179] The potential harm to bilateral relations with Mexico and the real risk of retaliation prevail over the amorphous benefits of enforcement.[180]

The difficulties are exacerbated by the high legal standard that triggers a Part V proceeding: a state's *persistent* failure to effectively enforce its environmental law. (By contrast, *any* failure of effective enforcement is sufficient to trigger a factual record.) In the absence of an actual Part V dispute settlement proceeding addressing Mexico's maquiladora enforcement policies in the border region, it is impossible to adequately evaluate Mexico's potential liability. The heightened standard creates uncertainty about the likelihood of success even with a clear factual record. The incentive to initiate a Part V dispute settlement process

177. *See* ROGER FISHER, IMPROVING COMPLIANCE WITH INTERNATIONAL LAW 20–22 (1981); Kenneth W. Abbott & Duncan Snidal, *Values and Interests: International Legalization in the Fight Against Corruption*, 31 J. LEG. STUD. 141 (2002).

178. *See, e.g.*, Ohio v. Dep't of Interior, 880 F.2d 432, 438 (D.C. Cir. 1989).

179. John Wirth has suggested that Canada's reluctance is explained by fears that the Part V process might be used against that nation in the future. *See* Wirth, *supra* note 123, at 205. Mexican concerns about the submission process may also be driven by the risk of disclosure of proprietary information and business secrets during the process. *Id.*

180. *See* Knox, *supra* note 6, at 59.

is likewise diminished. In the end, the public choice of treaty enforcement impedes the effectiveness of transparency in promoting adherence to the NAAEC's duty of effective environmental enforcement. The outcomes in the Metales matter confirm these concerns.

2. The Accountability of International Organizations to Individuals and Communities

Who should be held accountable for the failures of national enforcement and the inability of the CEC submission process to induce the Mexican and U.S. governments to meaningfully address the problems at the Metales site? The national governments clearly must bear primary responsibility. But what about the CEC? Metales was a direct result of the trade liberalization efforts that created the maquiladora industry. The NAAEC was designed to be one of the primary responses to such environmental problems. Since the CEC submission process, triggered when a party fails to comply, has a quasi-supervisory role in national environmental enforcement, shouldn't the CEC share in the blame?

Holding the Commission accountable for Metales is in many respects akin to placing ultimate responsibility in an attorney general or district attorney for the prosecutorial decisions of their deputies. But the comparison is problematic, at best. Suggesting that the Commission has a supervisory role over national environmental enforcement officials incorrectly implies that it can take significant action independent of the party states and that it has authority over them. The reality is the reverse. The Commission is ultimately governed by the party states (through the Council). It cannot initiate any significant sanctions procedure on its own. Nor can it appeal to a higher authority other than the party states themselves. The Commission could even be terminated if the parties jointly chose to do so.[181]

Like most international organizations, the CEC is a creature of the states that created it. It is thereby subject to the control of and politically accountable to the NAAEC party states. Individuals and small communities like Colonia Chilpancingo usually play no significant role.

The lack of accountability of international institutions is hardly a surprise to international lawyers. The structures of these institutions reflect international law's bias against individuals. The prevailing notion that international law gives rise to rights and duties primarily between

181. *Cf.* Chris Tollefson, *Games Without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime*, 27 YALE J. INT'L L. 141, 178–83 (2002) (describing ongoing actions by the Parties and the Council in limiting the discretion and control of the Secretariat).

states still largely holds true.[182] The situation is not fundamentally different within the NAAEC. Even though private individuals may petition the Commission to generate a factual record, their role in and control over the process is minor. They are adjuncts to party states, not primary stakeholders within the process.[183]

Like administrative agencies, international organizations may ultimately be accountable through the national governments and political leaders that control them. Thus, the Commission is arguably responsible to the political constituencies of the three NAAEC parties through the Council's supervision.[184] However, experience with administrative agencies in the United States suggests that, in practice, such control and accountability is quite limited. Those practical limitations apply to the Council's control of the Commission as well.

Direct supervision of international organizations is also limited and fractured. The NAAEC provisions limit the powers of the Council with respect to the Commission. The Council's tripartite nature further imposes collective decision-making requirements that insulate the CEC from true political accountability to the party states themselves.

That assessment, however, begs the ultimate question of accountability. The NAAEC parties are, by virtue of representation on the CEC Council, a part of the Commission itself. And the most important powers within the NAAEC—to initiate Part V dispute settlement processes and to make the factual record public—are reserved to the party states and Council. The Secretariat has no direct role in their exercise.

It appears, then, that the submission process failed the residents of Colonia Chilpancingo not because of the Commission's lack of accountability. Rather, Metales is evidence of a lack of commitment or resolve by the national governments to force a resolution of these issues. As the entities that ultimately control the Commission, the party states have refused, or have lacked the political will, to make the submission process work. It is their joint activities—or, rather, their lack of concerted action—that make the Commission generally unresponsive to communities such as Colonia Chilpancingo.

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182. See L. OPPENHEIM, INTERNATIONAL LAW 636–39 (H. Lauterpacht ed., 8th ed. 1955); *see also* Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1088–93 (1992); James Cameron & Ruth Mackenzie, *Access to Environmental Justice and Procedural Rights in International Institutions*, *in* HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 129–52 (Alan E. Boyle & Michael R. Anderson eds., 1996). One of the notable exceptions is international human rights law.

183. *See infra* Part II(B)(3) on lack of citizen control over and participation in process.

184. That circumstance does not provide the Commission with unchecked power to do as it pleases. Most of the tasks that are not subject to the Council's direct control are technical, administrative, or otherwise noncontroversial. Moreover, even when there is no direct ability to influence Commission activities, control may ultimately be exerted through the appointment of Commission staff.

B. The Political Economy of the Border Region

The difficulties of holding party states and the Commission itself accountable through the structures of the NAAEC do not fully explain the problems at Metales. Why did the Mexican and U.S. governments not proceed more vigorously against Jose Kahn and New Frontier Trading in the first instance, and why have the heavy-metal wastes at Metales languished for almost a decade? The citizen submission process was intended to be triggered only when national governments have failed to enforce their environmental laws. The question thus becomes why the enforcement failures of the United States and Mexico occurred in the first place.

One place to look for an explanation is the political economy of the border region and of environmental regulation, both within Mexico and the United States. Border communities like Colonia Chilpancingo are poor and economically marginalized. As is true for most of those on the lower economic rungs of society, their lack of economic clout goes hand in hand with their political disenfranchisement. Economic trends in Mexico in recent decades, including the shrinking significance of labor unions, have contributed as well.[185]

Exacerbating these trends is the Mexican government's great degree of centralization,[186] a political system that has been described by some as authoritarian.[187] Most government policy and regulatory decisions are made in the capital, Mexico City. Border communities are far away from decision-makers not only physically but also in terms of social and economic distance. Substantive opportunities for public participation in governmental decisions are generally lacking.[188] Because environmental policy has long been a low priority for Mexico,[189] regulatory failures are common. The socioeconomic marginalization of border towns results in correspondingly little political attention being paid to their concerns by public officials.[190]

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185. *See, e.g.*, HOGENBOOM, *supra* note 87.

186. *See, e.g.*, Christopher N. Behre, *Mexican Environmental Law: Enforcement and Public Participation Since the Signing of NAFTA's Environmental Cooperation Agreement*, 12 J. TRANSNAT'L L. & POL'Y 327, 329–30 (2003).

187. *See* HOGENBOOM, *supra* note 87, at 59; Williams, *supra* note 9, at 796.

188. *See* U.S. EPA, Evaluation of Mexico's Environmental Laws and Regulations—Interim Report of EPA Findings, (Nov. 22, 1991), *reprinted in* NAFTA & THE ENVIRONMENT: SUBSTANCE AND PROCESS 195–96 (Daniel Magraw ed., 1995); *see also* U.S. EPA, Evaluation of Mexico's Environmental Laws, Regulations, and Standards (Nov. 5, 1993), *reprinted in* NAFTA & THE ENVIRONMENT: SUBSTANCE AND PROCESS 598 (Daniel Magraw ed., 1995).

189. *See* HOGENBOOM, *supra* note 87, at 61–109.

190. Similar complaints have been raised by residents living on the northern side of the border region with respect to regulatory attention by the United States. *See, e.g.*, Williams, *supra* note 9, at 797–806.

What about the responsibility of U.S. regulatory authorities for Metales? Much of the waste shipped to Metales for recycling came from the United States. Ordinarily, such shipments are subject to state and federal environmental regulations. And, of course, New Frontier Trading was a U.S. entity and its owner, Jose Kahn, a U.S. citizen. If U.S. regulators had not allowed Kahn and New Frontier to export wastes from the United States and instead had taken steps to ensure their proper disposal before they became a problem at the site, the contamination would never have occurred.

Some things did happen. Kahn was indicted and pled guilty to two counts of transporting hazardous wastes in contravention of California's state environmental laws.[191] The EPA, however, took no substantive enforcement action. The legal rationale for the lack of U.S. intervention to prevent or curtail the contamination at Metales is fairly simple. The residents of Colonia Chilpancingo were not U.S. citizens, and the facility itself was located wholly outside the United States. Since federal environmental laws are generally presumed not to apply beyond U.S. borders,[192] their protections did not extend to Mexican communities. Thus, U.S. officials appeared to have no direct legal responsibility for Metales.

Such views, sincerely held and reflecting the reality and limits of agency powers, are shortsighted and, especially for policy makers, disingenuous. Laws, regulations, and public policy can be changed. The operative question is why such changes have not happened and why the United States has not used other avenues, including discretionary powers or diplomatic channels, to intervene.

Just as with the Mexican authorities, the underlying reasons for inaction or delay are all too clear. As noncitizens, the residents of Colonia Chilpancingo are not even part of the political body to which U.S. officials are accountable. Similar to the complaints of environmental justice activists in the United States and in many communities made up of the poor and people of color, their status as political outsiders puts them last in line to have U.S. officials take their interests seriously.

That truth becomes apparent when the economic dynamic of the Metales recycling operation is examined. Since the recycled lead and copper were reimported to the United States by New Frontier, Metales essentially allowed the externalization of waste and pollution byproducts of the recycling process to the Mexican side of the border re-

191. The EPA itself did not move forward with an enforcement action against Kahn largely because of uncertainties as to the origins of the wastes Kahn shipped and the applicability of recycling exemptions under RCRA regulations to Kahn's activities. Interview with John Rothman, Regional Counsel's Office, EPA Region IX (Mar. 4, 2004).

192. *See* Foley Bros., Inc. v. Filardo, 336 U.S. 281 (1949); EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991). *See also* Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668 (S.D.N.Y. 1991).

gion.[193] The simple reality is that principles of pollution prevention and internalization of pollution costs, highly valued by U.S. environmental regulators, do not always reach beyond the U.S. border.

The most troubling aspect of nonenforcement, however, is Mexico's failure to pursue Kahn once the Mexican criminal indictment had been issued and after Kahn abandoned Metales. Mexico had already initiated a criminal enforcement proceeding. Kahn's response was to flee the jurisdiction.

The Mexican government should have had an especially strong interest in extradition so as to counteract the appearance that Mexican laws can be flouted with impunity. Binational work groups, including one on enforcement cooperation formed under the U.S-Mexico Border XXI Program and its subsequent incarnations, stood ready to assist. Moreover, Kahn's prosecution by the Los Angeles County District Attorney's Office left little doubt that prosecutors knew Kahn's whereabouts.

Mexico's official explanation for its lackadaisical extradition efforts was the implied legislative repeal of the underlying legal provision in December 1996.[194] However, that still leaves the question of why the Mexican authorities did not seek extradition soon after they filed the indictment in May 1993 or after the arrest warrant was issued in September 1995.[195]

A less self-serving explanation for Mexico's dilatory response can be found in the context of U.S.-Mexico border relations. With illegal immigration and the illegal drug trade dominating not just regional but also national politics and public attention, environmental crimes, even those involving a contaminated facility left behind by a U.S. maquiladora operator, may simply appear much less significant.[196]

A third possibility is that Mexico has been concerned about the long-term chilling effect of a criminal prosecution on foreign investors, especially other maquiladora operators.[197] Any effort to pursue Kahn across the international border would send a signal not only to polluters that Mexican authorities are clamping down on violations of environ-

193. *See, e.g.*, Carmen G. Gonzalez, *Beyond Eco-Imperialism: An Environmental Justice Critique of Free Trade*, 78 DENV. U. L. REV. 979 (2001); Tseming Yang, *International Environmental Protection: Human Rights and the North-South Divide*, in JUSTICE AND NATURAL RESOURCES: CONCEPTS, STRATEGIES, AND APPLICATIONS 87 (Kathryn M. Mutz et al. eds., 2002).

194. Metales Factual Record, *supra* note 7, at 14 n.2.

195. Metales Factual Record, *supra* note 7, at 131, tbl., "Summary of Actions by Mexican Authorities with Respect to Metales y Derivados."

196. *Cf.* HOGENBOOM, *supra* note 87, at 61–62.

197. *See, e.g.*., Mary E. Kelly & Cyrus Reed, *The CEC's Trade and Environment Program: Cutting-Edge Analysis but Untapped Potential, in* GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 103 (David L. Markell & John H. Knox eds., 2003); Williams, *supra* note 9, at 787–90.

mental laws and regulations, but also to other maquiladora operators that they might become targets of prosecution. Given that other developing countries in East Asia and South America have been energetically competing with Mexico for U.S. investment capital and manufacturing jobs, robust enforcement might severely hamper Mexico's ability to attract foreign investors.

The last explanation is troubling.[198] To refrain from enforcement in order to attract industry and investment amounts to effectively lowering environmental standards for reasons of economic competitiveness. It is the specter of the race to the bottom that NAFTA advocates sought to dispel with the adoption of the NAAEC.

The most insidious consequence, however, arises from the unfortunate fact that Jose Kahn's willful violations of Mexican environmental laws were open and notorious. Just as a determined enforcement action against Kahn might have sent the "wrong" message to foreign investors, the failure of the Mexican and U.S. governments to pursue Kahn and to clean up the facility has conveyed a converse message to border communities, maquiladora operators, and the public: that the Mexican government does not take violations of environmental laws seriously and that the United States will keep quiet as long as the environmental problems stay outside its borders.

If the political economy of the border region was unique, the Metales matter could be dismissed as a symptom of the problems of a special region of the world. Unfortunately, Metales-type issues occur not only south of the U.S.-Mexico border. Poor and minority communities north of the border and elsewhere in the United States have complained for years of regulatory neglect by the EPA and state environmental officials.[199] The basic complaints about such environmental injustices as regulatory neglect, marginalization, and disenfranchisement are the same. Such communities receive scant governmental attention and are often disparately affected by pollution and environmental degradation.

The political and economic dynamics that are at the core of the Metales problem also appear in many developing countries. The pressures of poverty and joblessness that drive industrial development and

198. For a view that environmental concerns constitute a special interest that should not stand in the way of trade liberalization, see Javier Mancera, *A Mexican View on Trade and Environment*, in CAROLYN L. DEERE & DANIEL C. ESTY, GREENING THE AMERICAS: NAFTA'S LESSONS FOR HEMISPHERE TRADE 31–38 (2002).

199. *See, e.g.*, Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law, A Special Investigation*, NAT'L L. J., Sept. 21, 1992, at S2; CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS (Robert D. Bullard ed., 1993); UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR (Robert D. Bullard ed., 1994); LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT (2000).

trade liberalization lead to uncontrolled development, increased pollution, and risks to the public health of local populations. While the most common sources are local polluters, the importation of the industrialized nations' hazardous wastes, ostensibly for recycling, has become a mainstay of the economies of countries such as Nigeria, India, and China. But the Metales debacle occurred virtually in America's own backyard and, with the public attention generated by media reports and the citizen submission process, its consequences cannot be ignored.

C. The Operation of Markets and Social Norms

The third issue that must be considered for a full understanding of the environmental problems at Metales is the operation of markets and social norms. The coercive force of social norms and institutions on individual and corporate behavior is not as strong as traditional deterrent sanctions. Nevertheless, their influence can be significant, especially when legal deterrent sanctions are not available.

Markets and social norms can provide incentives and disincentives for behavior in the same way as legal sanctions and government subsidies. Markets open opportunities for profit or loss. Social norms set the stage for social approbation or disapproval that can affect a person's or company's standing and reputation in the community. Such responses to the tragedy of the commons are much more informal and flexible than official actions.[200] However, their effect can be the same. For example, Carol Rose has shown that in the absence of legal rules, custom can be an effective mechanism to regulate access to common resources.[201] Robert Ellickson has written about the effectiveness of social norms, as expressed by peer pressure and social expectations, in reducing overgrazing on open-access pastures.[202] In societies and cultures without formal and well-developed systems of law, social institutions, including cultural and religious taboos, step in to supply the operative rules for access to common resources.[203]

Market-based inducements to behavioral change are sometimes the most effective means of reaching corporate actors, because they influ-

200. ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (James E. Alt & Douglass C. North, eds., 1990).

201. Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986).

202. ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

203. *See e.g.*, Johan Colding & Carl Folke, *The Taboo System: Lessons about Informal Institutions for Nature Management, 12* GEO. INT'L ENVTL. L. REV. 413 (2000); Martin S. Weinstein, *Pieces of The Puzzle: Solutions For Community-Based Fisheries Management From Native Canadians, Japanese Cooperatives, And Common Property Researchers*, 12 GEO. INT'L ENVTL. L. REV. 375, 379 (2000).

ence the bottom line. Advocates of free-market approaches to environmental problems typically propose to change business behavior by subsidies and taxation. For example, tax breaks may encourage the development and use of energy-efficient or alternative-energy technologies, and discourage pollution and waste creation.[204]

Government does not have a monopoly on the use of markets to influence environmental behavior. Market strategies are available to civil society as well. Consumer boycotts and public campaigns to change private purchasing preferences have exerted strong pressure on industry to change its behavior. More recently, a movement to educate consumers to make socially and environmentally conscious choices has increased demand and expanded markets for such commodities as "fair trade" coffee and energy-efficient hybrid cars. Business leaders, meanwhile, have learned that a reputation among consumers as an environmental bad actor can hurt the bottom line, whereas a positive environmental image can drive sales.[205] Social norms and public pressure can also be credited for the growth of voluntary codes of conduct and other voluntary business measures designed to lessen pollution and environmental degradation.

Why did social institutions and market pressures fail to prevent the poor environmental practices at Metales and dissuade Kahn from abandoning the facility rather than clean it up? First, poverty, the very condition that has marginalized Colonia residents socially and politically, also marginalizes them as an economic force. As a group with little economic power, their ability to use the market to punish or reward polluters and bad environmental actors is extremely limited.[206]

The likelihood of success in recruiting support for a boycott from other communities or other businesses was slim. In spite of media reports, the plight of communities such as Colonia Chilpancingo is largely unknown outside of the border region. Their economic and social marginalization puts a distance between them and most communities in the United States that makes it that much harder to generate feelings of solidarity and to obtain support. Moreover, the physical remoteness of Mexican border communities from most U.S. population centers makes their problems seem less real than the ones most Americans encounter daily in their own neighborhoods.

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204. *See, e.g.*, Robert N. Stavins, *Economic Incentives for Environmental Regulation*, *in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 6 (1997).

205. In some other human rights and social justice contexts, such as boycotts of South Africa to protest apartheid, the magnitude of consumer sentiments mobilized has been even more significant.

206. Moreover, any economic influence Colonia residents do possess would have had minimal influence on Kahn because Metales and New Frontier sold their products mainly to other businesses, not to individual consumers.

Another obstacle to generating broad public support in the United States is the perception of Mexico as a third-world country with extensive poverty, poor health conditions, and widespread despair. The image leaves most in the United States with the sense that Metales is nothing out of the ordinary.[207] It might even appear to Americans as a benign sign of economic development and a necessary cost of job creation. After all, the U.S. response to third-world poverty and joblessness has been to encourage foreign investment and development of export manufacturing industries. The benefits that U.S. companies reap from cheap labor and weak regulatory structures go unspoken, while wastes are left behind and the cost of living for workers soars.[208] In effect, subconscious bigotry and selfishness facilitates purposeful disregard of such issues.

The same social dynamics have also made the exercise of social pressure and social norms less likely to work on Kahn and those associated with the Metales operation. Like an absentee landlord, Kahn operated his business in a community in which he did not live. He was not subject to the social disapproval and pressures of the surrounding neighborhood that might have induced him to act more responsibly. The community in which he does live, San Diego, has little direct stake in the pollution at Metales. And with the international border separating his residence from Tijuana, Kahn is not even subject to the pressures of a common national society that might have sought to induce responsible action through other means.[209]

As much as the political economy of the border region is the result of the relationship between an industrialized and a developing country, the failure of markets and social institutions is connected to the same dynamics. Joblessness and the economic development needs of developing countries create opportunities for international trade and investment. But they also weaken the ability to bargain for and affect the distributional balance of pollution and environmental degradation that go along with foreign investment and a higher gross domestic product. Poverty, geo-

207. *Cf.* Angela P. Harris, *Criminal Justice as Environmental Justice*, 1 J. GENDER RACE & JUST. 1, 16 (1997).

208. *See, e.g.*, Elvia R. Arriola, *Voices from the Barbed Wires of Despair: Women in the Maquiladoras, Latina Critical Legal Theory, and Gender at the U.S.-Mexico Border*, 49 DEPAUL L. REV. 729, 768–69 (2000); ROBERT MANNING, FIVE YEARS AFTER NAFTA: RHETORIC AND REALITY OF MEXICAN IMMIGRATION IN THE 21ST CENTURY 7 & note 7 (Center for Immigration Studies 2000). In the border region, a higher cost of living has left real wages largely stagnant since the adoption of NAFTA in 1994. *See* Tim Weiner, *Free Trade Accord at Age 10: The Growing Pains are Clear*, N.Y. TIMES, Dec. 27, 2003 at A1 & chart. In fact, between 1993 and 1998 real wages in the maquiladora manufacturing industry dropped from US$1.77 an hour to US$1.56 an hour. *See* MANNING, *supra*, at 9–10 & tbl. 4 (2000).

209. There is no evidence that Kahn was a member of a trade association that might have subjected his business operations to association standards. In other words, it does not appear that Kahn was subject to peer pressure to act more responsibly or to operate Metales according to generally accepted business practices.

graphical distance, and cultural differences widen the gulf between the perceptions, expectations, and sensibilities of members of wealthy industrialized societies and their poorer cousins. The result is that the bonds of empathy, community, and shared sense of destiny that might instill a desire to act altruistically, or at least to look beyond one's narrow self-interest, are weakened and less able to compel assistance. Here, the failures of markets and social institutions to positively affect the behavior of New Frontier and Kahn precipitated the irresponsible operations at Metales.

IV. UNDERSTANDING THE LESSONS OF METALES: LOOKING FORWARD

The Metales matter has brought to light pervasive structural problems of international environmental agreements, like the NAAEC, that stymie their enforcement. Fashioning practicable long-term solutions requires an honest assessment of the constraints under which international organizations operate, the political disconnect between government agencies and marginalized populations such as the poor and people of color, and the obstacles that block social institutions and markets from effectively deterring environmental misconduct.

I propose two sets of reforms. One set consists of specific recommendations for changing the citizen submission process.[210] Even if such reforms are politically infeasible, the proposal remains relevant to ongoing negotiations to expand NAFTA to the rest of the Americas. In particular, the negotiations for the Free Trade Area of the Americas have led to demands for an environmental side agreement similar to the NAAEC.[211]

The other proposal is to create a binational environmental special-purpose district that would complement the reformed citizen submission process with a substantive environmental enforcement arm. Such a district would resemble many existing environmental special governmental entities, such as regional air quality districts under the federal Clean Air Act and the International Boundaries and Waters Commission that operates in the U.S.-Mexico border region. A critical difference, however, is that I propose that the new district have an elected governing commission. I elaborate on the organization, rationale, and feasibility of these two proposals below.

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210. Some of my suggestions parallel those of others. *See, e.g.*, Block, *supra* note 3, at 540–42.

211. The Central American Free Trade Agreement already incorporates a citizen submission process in its final text.

A. Improving Process: Reforming the Citizen Submission Process to Promote Accountability

I propose four structural reforms of the citizen submission process: (1) formalizing and opening up the process for developing and finalizing the factual record to promote more citizen input and participation, (2) expanding the process's mandate to include the preparation of legal conclusions, (3) making the submission process largely autonomous from Council control, and (4) allowing private citizens to trigger the Part V dispute settlement process with respect to persistent enforcement failures. The first three reforms improve transparency by expanding the number of people involved in shaping the information-gathering process, the type of information generated, and the authority of the Secretariat. They judicialize the submission process. The fourth shifts power away from states toward nonstate actors. All of these changes would require amendment of the NAAEC.

1. Formalizing and Opening up the Factual Record Development Process

While private individuals can, at present, trigger the development of a factual record and may provide information to the Commission for inclusion in the document, they are largely excluded from actively shaping the record's scope and content. In particular, the public does not have a formal role in the review of the draft factual record, as the parties to the NAAEC do. Nor does the public have a right of access to the factual record and the parties' submissions. For example, Mexico was able to keep its response to the Metales submission secret until just a few months before the draft factual record was completed. The remedy would be to require that all submissions and responses to the Commission be made public unless the Council, by majority vote, expressly imposes secrecy for articulated exigent circumstances.

Three characteristics of this reform step make it particularly attractive. First, formalizing and opening up the factual record development process to greater public participation would make the process more adversarial. The submitters and the responding party could, and likely would, more vigorously comment on and dispute each other's positions and assertions than they do at present. Such a robust exchange of views would improve the final factual record's accuracy and completeness. Second, formalization and greater openness would enhance the process's legitimacy. Finally, no additional resources would need to be expended to implement the reform.

2. Preparing Legal Conclusions

The NAAEC calls on the submission process to generate a factual record. That mandate has been interpreted to mean that the Commission should not draw legal conclusions from the facts it finds. Without such a legal evaluation, the submission process is seriously hampered in its ability to promote accountability by national governments. The subject party of the factual record can simply deny noncompliance with the NAAEC, by pointing, for instance, to excusing conditions unevaluated by the Commission. A submission process with an expanded mandate could help prevent a party from misleading others about its compliance record, as well as reduce ambiguity and disputes about the meaning of the effective enforcement requirement.[212]

Expanding the submission process mandate to include legal conclusions would require few additional resources and thus should present few serious difficulties. At present, the Commission staff investigating and preparing factual records consists of lawyers by training, and their proficiency in legal analysis should be of little doubt. Furthermore, the ability of parties to review and comment on draft factual records, combined with greater openness of the submission process, ought to alleviate concerns about errors and misinterpretation of laws.

3. Making the Citizen Submission Process and Factual Record Development Semi-Autonomous

Even though the Council and the party states have no formal and specific role in preparing the factual record, the Council retains the right to influence the record's development at two key points: the approval to prepare a factual record at all and the decision to release the factual record to the general public.[213] The Council can either prevent the investigation from going forward altogether or prevent the public release of its result. While it has never taken the latter step, the Council has refused on several occasions to allow the investigative and factual record development process to go forward with little or no explanation.[214] Decreased transparency has been the outcome.

The remedy is to turn over such decisions to the Secretariat or the staff involved in the submission process, thereby creating a semi-

212. *See* CHAYES & CHAYES, *supra* note 79, at 22–26. Authoritative legal interpretation of treaty obligations can educate potential violators about treaty requirements, inform parties about their own levels of compliance, and allow parties to correct or avoid inadvertent noncompliance. ENGAGING COUNTRIES, *supra* note 12, at 543–44.

213. *See* NAAEC, *supra* note 1, at art. 9; *see also* Knox, *supra* note 6, at 89–90.

214. *See, e.g.*, Commission for Environmental Cooperation, SEM 98-005 (Aug. 11, 1998), SEM 98-007 (Oct. 23, 1998), SEM 01-001 (Dec. 10, 2002).

autonomous unit within the Secretariat. Even if the Commission had the ultimate power to deny official adoption of a factual record or some other review power, the usefulness of the factual record development process would not be significantly reduced. As long as the process is fully public and is brought to a conclusion on its own merits, an unadopted but accurate and persuasive public factual record could promote the goals of transparency.

Creating a semi-autonomous process would not be a radical move. Federal agencies in the United States have semi-autonomous administrative adjudicative processes. EPA's own administrative law judges and the Environmental Appeals Board are relevant examples.[215] The head of the agency retains the ultimate power to overrule the decisions of the internal administrative process. However, in instances where overruling a carefully prepared and persuasive opinion would be seen as an act of political manipulation, the agency head would do so at her own political peril.

Independence would reduce the impact on the submission process of politically motivated or self-interested decisions by the parties. Just as important, however, it would also promote decision making based on principle and rules.

4. Allowing Private Individuals to Initiate the Dispute Settlement Process under Part V of the NAAEC

Presently, only state parties may initiate dispute settlement proceedings under Part V of the NAAEC. To ensure that the anticipated consequences of transparency translate into better environmental management and enforcement, private individuals ought to have standing to initiate such proceedings. Although this may seem to be the most radical of the four proposed reforms, it falls well within precedent established in U.S. domestic environmental laws and under NAFTA's Chapter 11.[216]

There are some significant implementation issues. What remedy should a successful Part V proceeding grant a private individual? How

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215. *See, e.g.*, Nancy B. Firestone, *The Environmental Protection Agency's Environmental Appeals Board*, 1 ENVTL. LAW 1 (1994). Such a process would have precedent in the investor protection provisions of NAFTA's Chapter 11, under which the independent arbitration process may result in an award of damages.

216. NAFTA Chapter 11 grants foreign investors from a NAFTA country protection from the host state with respect to ensuring national treatment, most favored nation treatment, minimum international standards, and performance requirements prohibitions. NAFTA §§ 1102, 1103, 1105, 1106. In addition, it allows an aggrieved investor to initiate a dispute settlement process against the host nation. In at least one instance, it has already resulted in an arbitral award against Mexico because environmental regulatory actions impaired the chapter 11 rights of a U.S. investor. *See generally* HUNTER, SALZMAN & ZAELKE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1202–1225 (2d ed.).

should such a decree be executed? An award of millions, even hundreds of millions, of dollars may be the appropriate outcome of an arbitration between states, but for private individuals it might well be a windfall out of all proportion to the direct harm they suffered. Moreover, where private individuals are seeking environmental remediation—injunctive relief to force a party to clean up a waste dump or change its waste disposal practices—a damage award, no matter how great, might be useless. To the extent that outsized awards are meant as punitive damages, granting them to private individuals may not be effective in coercing compliance. Whereas state parties can enforce their Part V awards by imposing trade sanctions, no such power is available to private individuals.

These problems are not insurmountable. One might imagine various processes by which individuals could enforce their Part V awards in national courts, just as they would any other arbitration award.[217] Part V awards could also be treated as U.S. environmental citizen suit penalties are: as payments due to the treasuries of the various NAAEC parties.[218] To the extent other party states have been materially harmed by enforcement failures, it might be fair and just for those state coffers to receive a portion of the award. Another possibility is to pay the awards into a special fund administered by the CEC. Such monies could be used to address the environmental and public-health harms caused by enforcement failures. Such a special fund may be the preferred solution, because it would advance the mission of the NAAEC to provide a substantive response to the negative environmental and public-health impacts of NAFTA.

Giving private individuals standing to initiate Part V proceedings is arguably the most controversial of the four proposed reforms. It has the potential for imposing financial liability on a party beyond what it agreed when it signed the NAAEC and NAFTA. Nevertheless, there is precedent for such individual standing in NAFTA's Chapter 11 provisions. Whether any of these proposals are adopted will depend not just on the political will of the NAAEC party states but also the amount of public dissatisfaction and political pressure exerted on them to amend the NAAEC.

B. What About Substance? Imagining a Border Environmental Quality District

Reform of the NAAEC citizen submission process to enforce the obligations of party states will address only one set of causes of the

217. In fact, that is the assessment enforcement mechanism specified for Canada. NAAEC, *supra* note 1, at annex 36A.

218. *See, e.g.*, Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 106 (1998).

Metales problems. Sound management of the border environment will require the setting and implementation of adequate substantive environmental standards, the creation of mechanisms to hold officials accountable for success or failure in achieving environmental goals, and the grant of specialized powers to address transboundary pollution and enforcement issues. These substantive concerns cannot easily be integrated into the CEC's existing mandate and mission.

Hence, I propose the creation of a U.S.-Mexico border environmental quality district ("BEQD"). The BEQD would have a geographic jurisdiction coextensive with the 100-kilometer border zone established under the La Paz Agreement.[219] Its charge would be to address environmental and public-health issues within its jurisdiction. The BEQD would be administered by a board of commissioners elected by border-zone residents. Its work, like that of other local environmental governmental organizations, would have to be coordinated with that of EPA and other U.S. agencies with environmental missions as well as the Mexican environmental ministries. As a binational regional government focused specifically on environmental and public-health issues at the border, it would also have the power to tax and raise revenues to fund its mission.[220]

The BEQD might be controversial in the United States because it would grant governmental power, including taxing power, to a commission not solely controlled by U.S. nationals. Like many of the submission process reform proposals, however, the concept and rationale for the BEQD is not novel. Environmental special-purpose districts have widespread and long-standing antecedents in U.S. law. For example, regional air quality districts created to implement the mandates of the federal Clean Air Act are a form of regional government endowed with regulatory power to address environmental issues. Nor is the concept of an agency with transboundary jurisdiction anything new. Binational organizations such as the U.S.-Mexico International Boundary and Water Commission ("IBWC") and the U.S.-Canada International Joint Commission have existed for decades and exercise jurisdiction over bodies of water that cross or constitute the boundaries between two nations. These commissions are tasked to address pollution and environmental quality issues within their jurisdiction.[221] The United States also has experience

219. Of course, considerations of manageability and adequacy of representation might counsel the creation of a number of smaller environmental districts as opposed to a single entity spanning the entire border. The discussion here applies equally to both models.

220. With regard to the assessment of environmental fees and taxes to fund environmental programs at the border, see HUFBAUER ET AL., *supra* note 110, at 60–61.

221. The European Union and some of its precursor entities are similar entities.

domestically with regional government entities that cross state boundaries.[222]

The BEQD's substantive authority to make and enforce environmental policy would be similar to that of existing U.S.-Mexico border institutions, though greater in scope. Merger of such institutions as the IBWC, the Border Environment Cooperation Commission ("BECC"), and the North American Development Bank ("NADBank")[223] into the BEQD would be an efficient and effective way to immediately provide the new district with a base of financial, technical, and human resources.[224] Financial resources could also be generated by taxation of maquiladora industries and other polluting border businesses. As long as the BEQD has access to adequate resources and the authority to regulate and enforce, whether directly by levying taxes or indirectly by controlling the actions of other agencies, work toward environmental and public-health goals in the border area should be greatly enhanced.

Subjecting the leadership of the BEQD to election by the border population would be critical to the district's success. Popular elections would create greater political accountability to the border residents themselves. Elections would also make the BEQD more responsive to the needs of the local people than national governmental agencies in far-off Washington and Mexico City are. Furthermore, it is likely that a multimember elected commission would represent diverse interests, including communities that might otherwise be disenfranchised or whose interests would usually be ignored. Finally, creating opportunities to be involved in the management of the BEQD through electoral participation would empower the border population, encouraging it to monitor more closely the work of agencies and to be more involved in the BEQD's work. The resulting outcomes would enjoy greater legitimacy because local communities would have a greater stake in the decision-making process. Ultimately, the BEQD would promote values of participatory democracy in the management of the border environment.

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222. *See, e.g.*, Port Authority of New York and New Jersey, N.J. STAT. ANN. § 32-1-1 (2004); New Hampshire–Vermont Interstate Compact, N.H. REV. STAT. ANN. § 15-200-B (2004).

223. For an overview of the BECC and the NADBANK, *see e.g.*, Sanford E. Gaines, *Bridges to a Better Environment: Building Cross-Border Institutions For Environmental Improvement in the U.S.-Mexico Border Area*, 12 ARIZ. J. INT. COMP. L. 429 (1995); David A. Gantz, *The North American Development Bank and the Border Environment Cooperation Commission: A New Approach to Pollution Abatement Along the United States-Mexican Border*, 27 LAW & POL'Y INT'L BUS. 1027 (1996).

224. Such a change would require amendment of various existing bilateral U.S.-Mexico treaties. If a simple merger is not possible, creation of new and closer explicit linkages between existing institutions could increase cooperation with or provide assistance in the implementation of the mandates of the BEQD.

The rationale for the BEQD's structure is that it would improve the relationship between environmental regulators and the people who live within the border region. Its jurisdictional reach across the border would formally recognize the connections between the environment and the communities on both sides. As a regional institution with a leadership elected by those within its jurisdiction, the commission would also be politically accountable to those it would be charged with serving. Ultimate control would still remain with the respective party states. They would retain the power, as they do in any international organization, to change the BEQD's mandate or abolish it altogether. The drastic nature of abolition, however, would make it unlikely to occur in any but the rarest instances.

There is no question that there are significant obstacles to the creation of a BEQD. Yet, they are more to be found in the political imagination than in practical reality. The concepts of regulatory integration, transboundary governance, and empowerment of individuals, communities, and other sub-national actors in international regimes are proliferating all over the world. They can be found in all areas of international law, including in the growth of multilateral and bilateral economic treaty systems such as the NAFTA itself, political integration in Europe, and continuing expansion of multilateral treaty systems into all areas of human activity. Creation of a BEQD, or some institution with its essential qualities, appears to be less a question of "if" than "when." For the border, however, it is also a question of whether such changes will come soon enough to prevent significant long-term damage to the environment and the communities living there.

C. The Broader Lessons for International Environmental Treaty Regimes

The Metales story holds lessons for the management of international environmental problems beyond the specifics of the border region and the workings of the CEC. First, process alone cannot serve as the sole solution to substantive environmental problems. Second, regulatory responses to many environmental problems cannot be successful without addressing the underlying economic pressures, social justice demands, and ecological realities. Finally, mechanisms that make officials politically accountable to the people who are to be benefited or protected by international environmental agreements are critical to the success of international structures. In the border region, such responses may be embodied, as I have proposed here, in a binational special government district.

The critical question for those with interests extending beyond the U.S.-Mexico border to cross-continental or global environmental issues,

however, is how these lessons can be applied elsewhere. Even though such issues range far beyond what this article set out to do, it may be worthwhile to provide at least some guiding thoughts.

First, international organizations cannot focus on cooperative processes alone without articulating substantive goals. They must have substantive power to act, whether by providing financial assistance or by imposing and enforcing regulatory requirements on polluters and other responsible parties.

Although this lesson may seem too obvious to merit stating, it is quite difficult to put into practice. Decisions about resource allocation inherently raise questions about resource availability, policy priorities, and opportunity costs. Granting an international organization the substantive power to regulate means giving up a measure of national sovereignty. If commitments to environmental protection goals are to be more than lip service, however, governments must back them up with resources.[225]

Second, incorporating related nonenvironmental issues encounters significant impediments. They may come under the aegis of international organizations such as the World Trade Organization that do not have specific mandates with respect to the environment. In a sense, the lack of opportunities for formal linkages among many international organizations makes it harder to integrate the underlying issues into a coherent agenda. Short of merging such organizations into a single entity, changing their underlying missions to incorporate environmental protection would be an appropriate intermediate step.

Finally, the problem of political accountability seems to suggest a significant limitation on the applicability of the border model to address global environmental issues. Accountability to a community presumes that there is a community of interests and values to which the organization can be accountable.[226] The U.S.-Mexico border region certainly is such an integrated community and environment. Global and cross-continental environmental problems, on the other hand, span a much greater diversity of cultures, communities, and interests. The lessons of the border do not seem to translate easily.

A community of interests need not be geographically based, however. If the goal of political accountability is to ensure the responsiveness of international environmental institutions to communities concerned about environmental protection and public-health issues,

225. Where significant resources have already been committed to environmental issues, for example by institutions such as the World Bank, the first task is to coordinate the use of such disparate resources within an integrated agenda.

226. Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT. L. 596, 615–17 (1999).

environmental advocacy organizations and community activists have important stakes in the mission of such institutions. Why not expand participation in institutional decision making to include representatives of various environmental interest groups? To make them real participants in the decision-making processes of the institution, why not, for example, give these groups voting power?[227]

It is in this respect that the Joint Public Advisory Committee ("JPAC") of the CEC, intended to be representative of civil society, is inadequate.[228] There is little question that the JPAC has been important in shaping the operations of the CEC.[229] However, its powers are advisory only. As demonstrated by the Metales matter, it has not been able to introduce the type of accountability to the CEC that might be expected from the grant of substantive power within the organization.

Questions about how extensive participation and voting power should be, and which organization ought to be directly represented, may be difficult. But they are by no means unanswerable. Regardless of their specific manifestation, such reforms are bound to result in greater political accountability and responsiveness to the interested and affected public.

CONCLUSION

A close examination of how the Commission for Environmental Cooperation and the party states have dealt with the Metales y Derivados case teaches important lessons about the effectiveness of the citizen submission process. It also illustrates the difficulties of managing environmental problems in developing countries that are associated with international trade liberalization and economic development. Undoubtedly, the structural and political obstacles are formidable. But there are also obvious solutions that are conceptually familiar and have been applied successfully to other international problems. Finding the political imagination and courage to apply them to the border environment and the global commons is the challenge ahead for improving the effectiveness of international environmental governance.

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227. It is a model that was suggested for the CEC by environmental organizations. *See* Environmental Safeguards for the North American Free Trade Agreement: Priority Recommendations to Negotiators and Congress, With Model Language for Key Provisions (June 1992), reprinted in NAFTA & THE ENVIRONMENT: SUBSTANCE AND PROCESS 676 (Daniel Magraw ed., 1995).

228. The U.S.-Mexico Good Neighbor Environmental Board, an advisory body, does not appear to have a much greater capacity to promote substantive environmental improvement.

229. *See, e.g.*, Knox, *supra* note 6.

EPILOGUE

On June 24, 2004, the activists of Colonia Chilpancingo signed an agreement with the Mexican government to provide for a comprehensive four-stage, five-year cleanup of the Metales site. For the first stage of the cleanup, which has already commenced as this article is going to press, the Mexican government has committed to spending about US$700,000, including an US$85,000 grant from the EPA. It calls for the removal of 2,500 tons of toxic materials from the site and was to be completed by November 2004. The initial US$700,000, however, will be inadequate to fully rehabilitate the site, and it is unclear where the funds to finish the job will come from. But the agreement and initial actions give cause to hope that this time the Mexican government will follow through on substantive remedial action. After a decade of struggle, victory seems within reach of the affected communities.[230]

The agreement is a milestone in the struggles of the communities. Yet it would be false to believe that it is also a sign of the submission process' success. Success came in spite of the obstacles in the way. It was the result of efforts outside of established and normal regulatory channels. Their success vindicates not the existing regulatory structures but the communities' and activists' conviction that alternatives had to be pursued. Maybe, if they can succeed against the odds, the prospect of reform of the submission process and the structure of environmental governance at the border stands a chance as well.

230. *Victory at Last!*, *supra* note 41.